

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWS-
PAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERA-
TION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM
INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO,
THE COMPUTER SOFTWARE AND SERVICES INDUSTRY AS-
SOCIATION, INC., INDEPENDENT DATA COMMUNICATIONS
MANUFACTURERS ASSOCIATION, INC., TANDY CORPORA-
TION, PHONE PROGRAMS, INC., OHIO CONSUMERS' COUN-
SEL, NATIONAL TELECOMMUNICATIONS NETWORK, MARY-
LAND PEOPLE'S COUNSEL, RADIOFONE, INC., AD HOC
TELECOMMUNICATIONS USERS COMMITTEE, COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION,

Petitioners,
v.

UNITED STATES OF AMERICA, BELL ATLANTIC CORPORA-
TION, AMERITECH, NYNEX CORPORATION, SOUTHWEST-
ERN BELL CORPORATION, BELL SOUTH CORPORATION,
PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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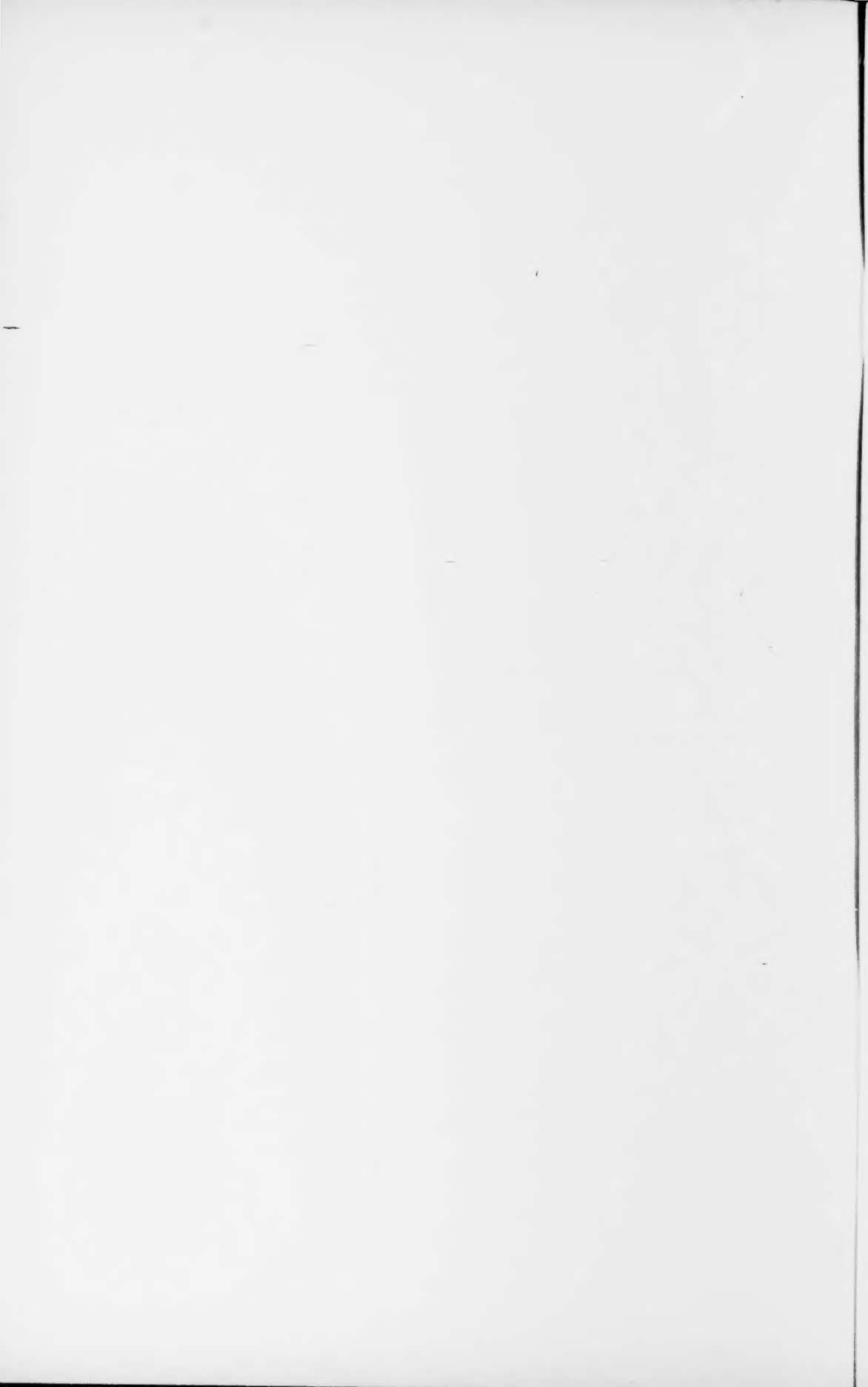
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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in replacing express language in the AT&T consent decree with its own "flexible" test for removal of critical, procompetitive restrictions on the business activities of telephone company monopolies.

2. Whether the Court of Appeals, in acknowledged conflict with other federal appellate courts, failed to accord appropriate deference to the conclusions of the district court concerning consent decree language that the district court drafted, interpreted and consistently applied over many years.

RULE 14.1(b) AND RULE 29.1 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the list of parties in the Court of Appeals whose judgment is sought to be reviewed, is as follows:

American Information Technologies Corporation
 Bell Atlantic Corporation
 BellSouth Corporation
 NYNEX Corporation
 Pacific Telesis Group
 Southwestern Bell Corporation
 U S West, Inc.
 United States of America
 Federal Communications Corporation
 MCI Communications Corporation
 American Telephone and Telegraph Company
 Consumer Federation of America
 ADAPSO, The Computer Software and
 Services Industry Association, Inc.
 North American Telecommunications Association
 American Newspaper Publishers Association
 Ad Hoc Telecommunications Users Committee
 The Dunn & Bradstreet Corporation
 Telecommunications Industry Association
 National Association of Broadcasters
 Independent Data Communications Manufacturers
 Association, Inc.
 Phone Programs, Inc.
 Tandy Corporation
 Maryland People's Counsel
 Comcast Cellular Communications, Inc.
 Cybertel Corporation
 Cox Enterprises, Inc.
 Enhanced Services Council
 National Telecommunications Network
 National Cable Television Association, Inc.
 US Sprint Communications Company

Leghorn Telepublishing Company
 Direct Marketing Association
 Ohio Consumers' Counsel
 CompuServe Incorporated
 McCaw Cellular Communications, Inc.
 Radiofone, Inc.
 Alarm Industry Communications Committee
 Tymnet-McDonnell Douglas Network Systems
 Company
 Competitive Telecommunications Association
 Public Service Commission of the District of
 Columbia
 People of the State of California, et al.
 United States Telephone Association
 General Electric Communications and Services
 American Cellular Network Corporation
 Digital Directory Assistance, Inc.
 David Systems, Inc.
 Florida Public Service Commission
 The Media Institute
 Leghorn Telepublishing Company
 Hayes Microcomputer Products, Inc.
 National Consumer League
 Black Citizens for a Fair Media
 The Council of Churches of New York City
 National Association of State Universities and
 Land Grant Colleges
 Native American Public Broadcasting Consortium
 The National Indian Youth Council
 Office of Communications of the Church Federation
 of Greater Chicago
 Consumer Interest Research Institute
 Public Interest Computer Association
 National Association for Better Broadcasting

Pursuant to Rule 29.1 of the Rules of this Court, petitioners state as follows:

MCI Communications Corporation provides long distance and information services. It has no parent com-

pany, and its only non-wholly owned subsidiary is Philippines Global Communications, Inc.

ADAPSO is the principal trade association of the computer software and services industry. It has no parent company or non-wholly owned subsidiary.

The Ad Hoc Telecommunications Users Committee is an unincorporated entity which represents the interests of its members in telecommunications matters before the Federal Communications Commission, federal courts and state regulatory authorities. It has no parent company or non-wholly owned subsidiary.

Independent Data Communications Manufacturers Association, Inc., (IDCMA) is a trade association of manufacturers of equipment used for computer (data) communications. It has no parent company or non-wholly owned subsidiary.

Competitive Telecommunications Association (Comp-Tel) is a national industry association of competitive long-distance telephone carriers. It has no parent company or non-wholly owned subsidiary.

Phone Programs is a New York corporation which does business, *inter alia*, as an information provider. It has no parent company or non-wholly owned subsidiary.

Tandy Corporation is a manufacturer and retailer of telecommunications and electronic consumer products. It has no parent company or non-wholly owned subsidiary.

Maryland People's Counsel is a public agency of the State of Maryland that is authorized by statute to appear before courts and federal or state agencies on behalf of residential and noncommercial users of telephone and other regulated utility services. It has no parent company or non-wholly owned subsidiary.

Enhanced Services Council is a non-profit association formed for the purpose of ensuring the development of

fair Open Network Architecture standards. It has no parent company or non-wholly owned subsidiary.

National Telecommunications Network is a joint venture for several long-distance carriers. It has no parent company or non-wholly owned subsidiary.

The Ohio Consumers' Counsel is the statutory representative of Ohio's residential utility customers, including telephone customers. It has no parent company or non-wholly owned subsidiary.

Consumer Federation of America is a non-profit corporation consisting of local, state and national non-profit entities, whose purpose includes promoting the interests and rights of consumers. It has no parent company or non-wholly owned subsidiary.

The American Newspaper Publishers Association (ANPA) is an incorporated trade association of about 1,400 member newspapers which account for about ninety percent of the total daily and Sunday newspaper circulation in the United States. It has no parent company or non-wholly owned subsidiary.

Alarm Industry Communications Committee is a subcommittee of the Central Station Alarm Association, a trade association. It has no parent company or non-wholly owned subsidiary.

Radiofone, Inc., is a Louisiana corporation providing radio common carrier service to the public in various markets throughout the State of Louisiana. It has no parent company or non-wholly owned subsidiary.

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Petitioners,

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 900 F.2d 283, and is reprinted at pages 1a to 59a of the Ap-

pendix to this Petition ("App.").¹ The opinions of the United States District Court for the District of Columbia, from which appeal was taken, are reported at 673 F. Supp. 525, and 714 F. Supp. 1, and are reprinted at App. 62a-108a, and App. 109a-273a.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1990. App. 60a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

15 U.S.C. § 2, which provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 16(e), which provides:

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

¹ The Appendix is bound as a separate volume.

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

STATEMENT OF THE CASE

This case involves the consent decree that broke up the Bell System, perhaps the most important decree ever entered under the Sherman Act. Besides a massive divestiture, the decree established structural remedies to protect competitive markets from future abuse by the new owners of AT&T's local telephone monopolies. These remedies included restrictions against the divested Bell Companies' entry into lines of business vulnerable to their monopoly power.

The decree capped decades of Government and private litigation. Few industries have witnessed such a prolonged struggle to redress persistent antitrust abuses. To ensure that the remedy would endure, the decree directed that the line-of-business restrictions imposed on the divested Bell Companies would be removed only upon a showing "that there is no substantial possibility that the petitioning [Bell Company] could use its monopoly power to impede competition in the market it seeks to enter."

This Court affirmed the 1982 district court order that imposed the line-of-business restrictions and established the standard for their removal. *Maryland v. United States*, 460 U.S. 1001 (1983). In the decision below, however, the Court of Appeals for the District of Columbia Circuit disregarded the decree's express standard and substituted its own indefinite and "flexible" test for removing one of the decree's line-of-business restrictions.

The decision below conflicts with this Court's precedent and with decisions of other courts of appeals. The decision also raises important and unresolved questions about

the standards under which appellate courts review district court administration of consent decrees. Most importantly, the appellate court's ruling threatens to dislocate coherent enforcement of competitive protections that affect the daily lives of most Americans, as well as billions of dollars of annual investment in "a vast and crucial sector of the economy."² Review by this Court is critical to ensure that the hard-won consumer benefits of this landmark decree do not succumb to renewed abuse of the local telephone bottleneck.

A. The Decree

For over a century, the Bell System dominated the provision of telephone services and equipment in the United States. This nationwide vertically integrated enterprise was constructed on the foundation of the Bell Companies' local telephone monopolies. To restrain abuse of that monopoly power, the Government brought a civil action in 1949 to divest AT&T of subsidiaries that manufactured telecommunications equipment. However, in 1956 the Department of Justice agreed to what has been termed "a token settlement."³ Thus, neither that action nor a multitude of private antitrust actions diminished the Bell System's dominance of the telecommunications industry and its related markets.⁴

² *United States v. AT&T*, 552 F. Supp. 131, 152 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

³ Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess. 55 (1959). This and similar failures of antitrust enforcement eventually led to passage of the Tunney Act, which requires district courts to serve as an "independent check upon the terms of decrees negotiated by the Department of Justice," to determine whether they are in the "public interest" before they are approved and entered. See 552 F. Supp. at 149 & n.75; 15 U.S.C. § 16(e).

⁴ See, e.g., *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (affirming jury finding that AT&T unlawfully monopolized intercity

The 1982 consent decree resolved a fresh civil action brought by the United States in 1974 to address the intractable anticompetitive practices arising from the Bell System's local bottleneck monopolies. The Government alleged that the Bell System had broadly used its bottleneck control to undercut competition by marketplace rivals. Specifically, the Government claimed that the Bell Companies had refused competitors access to local telephone networks, refused or hindered connection of non-AT&T equipment, and precluded the sale of competitors' equipment to the Bell Companies.⁵ The gravamen of the Government's case was that this bottleneck abuse harmed consumer welfare by denying competitors the opportunity to compete on the basis of price and quality and thus restricted production and created dead weight losses to society. To maximize output and open markets to competition and innovation, the Government sought to divest the competitive portions of AT&T from the monopoly portions and to preclude the monopoly portions from participating in competitive markets where they were likely to abuse their bottleneck power.⁶

The Government's action came to trial in early 1981. In January 1982, near the trial's conclusion, the Gov-

long-distance market); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 487 F. Supp. 942 (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) (affirming jury finding that AT&T unlawfully monopolized telecommunication equipment markets). In all, more than 70 private antitrust suits "set forth a broad array of charges that the Bell System had abused local bottlenecks to impede or foreclose competition by long distance carriers, equipment manufacturers, and others." AT&T's Comments on the Report and Recommendation of the United States, at 15 (filed Mar. 13, 1987).

⁵ Complaint, *United States v. AT&T*, Civil Action No. 74-1698 (D.D.C., filed Nov. 20, 1974).

⁶ Response of the United States to Public Comments on Proposed Modification of Final Judgment, 47 Fed. Reg. 23320, 23325 (1982).

ernment and AT&T announced a settlement. 552 F. Supp. at 152. The consent decree proposed by AT&T and Assistant Attorney General William F. Baxter essentially granted the relief sought by the Government.⁷ To remedy the anticompetitive conduct stemming from AT&T's control of the Bell Companies' local telephone service monopolies, AT&T agreed to divest itself of the Bell Companies (sometimes called "Bell Operating Companies" or "BOCs").⁸ In turn, the divested Bell Companies were to be restricted from engaging in businesses that could be controlled by the local bottleneck. These forbidden businesses were: (1) providing interexchange (long-distance) telephone service; (2) manufacturing telecommunications equipment; (3) offering information services, such as Lexis and Westlaw, that are accessed by telephone lines; and (4) providing any other product or service that was not a natural monopoly service actually regulated by tariff. 552 F.Supp. at 227-228.

The district court undertook an extensive Tunney Act review to determine whether the proposed decree was in the public interest.⁹ The court granted interested persons rights to participate "which for all intents and purposes [were] equal to those possessed . . . by the parties" to the underlying case.¹⁰ After reviewing thousands of

⁷ As a formal matter, the settlement was implemented as a "modification" of the 1956 consent decree. Hence, the order ultimately entered by the district court was termed a "Modification of Final Judgment," sometimes referred to as "MFJ." 552 F. Supp. at 141 n.131.

⁸ The 22 Bell Companies were divested to seven Regional Holding Companies. Bell Atlantic, the Regional Company for this part of the country, received Bell Companies such as the C&P Telephone Companies of D.C., Maryland, and Virginia.

⁹ This review was initially contested by the Department and by AT&T, which tried instead to dismiss the 1974 case under Fed. R. Civ. P. 41(a). See note 3, *supra*. Although the district court did not pass specifically on the technical applicability of the Tunney Act, it applied the substantive Tunney Act procedures and standards. 552 F. Supp. at 145 & n.56.

¹⁰ 552 F. Supp. at 218-19.

pages of comments and requiring several changes, the district court approved the proposed settlement. The court found the line-of-business restrictions to be necessary because participation in the forbidden businesses "carries with it a substantial risk that the [Bell Companies] will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors." 552 F.Supp. at 224.¹¹

B. The Decree's Standard for Removing Restrictions

During the Tunney Act proceedings, the district court addressed future removal of the line-of-business restrictions. The proposed decree did not specifically refer to removal of the restrictions. The proposal did contain, as Section VII, a general provision common in consent decrees, which retained district court jurisdiction to enable:

any of the parties . . . to apply . . . for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F. Supp. at 231. The parties interpreted this proposed provision to mean that if they agreed upon removal of a line-of-business restriction, "the standard for such removal would be whether it is in the public interest."¹² If the parties did not agree, then the restrictions would be lifted upon a finding that the "rationale" for the restriction had become "outmoded" by technical developments. *See* 552 F. Supp. at 195.

¹¹ The court also modified the line of business restrictions in ways not directly pertinent to this petition. 552 F. Supp. at 231-32.

¹² Brief for the United States in Response to the Court's Memorandum of May 25, 1982 at 32. *See* 900 F.2d at 306; App. 50a.

However, the district court ruled that "[t]o avoid any question about the appropriate test, the standard for removal of [line-of-business] restrictions should be explicitly incorporated into the decree." 552 F. Supp. at 195. The court's proposed Section VIII(C) thus provided:

The restrictions imposed upon the separated BOCs by virtue of section II(D) [the line-of-business restrictions], shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

552 F. Supp. at 195. The district court's language made no distinction between contested and uncontested requests to remove the restrictions, as had been suggested by the parties in interpreting Section VII. The parties agreed to include Section VIII(C) in the final consent decree. *United States v. Western Electric*, 592 F. Supp. 846, 852 (D.D.C. 1984).

C. The Role of the Court, the Original Parties and Interveners in Enforcing the Decree.

Warned that administration of the decree should not depend solely on the original parties' initiatives, the district court conditioned Tunney Act approval on the parties' explicit consent to the court's acting *sua sponte* to enforce the decree.¹³ Similarly, the court from time to time granted non-parties, including petitioners here, formal intervening party status to participate in important

¹³ The parties agreed to the addition of Section VIII(I), App. 287a which provides:

The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

consent decree proceedings, including the proceedings at issue in this Petition.¹⁴

D. Proceedings to Change the Line-of-Business Restrictions Under Section VIII(C)

After entry of the decree, the Bell Companies made numerous requests to remove or waive the decree's line-of-business restrictions as applied to specific transactions or arrangements. Over 130 such requests were moved and considered under Section VIII(C) of the decree. The requests were brought by Bell Companies and in certain cases by the government as well.¹⁵ The overwhelming majority of these motions were not contested by original parties to the decree, and some were not contested by intervenors. Whether contested or not, these motions were evaluated—without objection—under Section VIII(C).

Further motions to remove line of business restrictions occurred in the proceeding under review. The Department of Justice had undertaken to report to the district court on the third anniversary of divestiture (and triennially thereafter) whether changes in the marketplace had elim-

¹⁴ *United States v. Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Feb. 4, 1987). Nonoriginal parties were active participants in both the briefing and oral argument of Bell Company motions to modify the decree's line-of-business restrictions. In the triennial review proceedings, for example, a "total of some 170 organizations and individuals availed themselves of the opportunity to intervene" and comment on proposals to modify the line-of-business restrictions. 673 F. Supp. at 529; *see also* 552 F. Supp. at 219 (granting intervenor status for proceedings on AT&T's plan of reorganization).

¹⁵ In 1984 the district court ruled that *all* Bell Company requests for removal under Section VIII(C) should first be reviewed by the Department and then presented to the Court as a Department motion under Section VIII(C). *United States v. Western Elec. Co.*, 592 F. Supp. 846 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). This ruling did not suggest any change of the burden on the petitioning Bell Company to make the showing Section VIII(C) requires.

inated the need for the line-of-business restrictions.¹⁶ In 1987, the Government made its first triennial report and the district court held extensive proceedings on the report and related motions.

In this triennial review proceeding, the Bell Companies and the Government moved *pursuant to Section VIII(C)* for removal of the information services restriction at issue here.¹⁷ Numerous intervening parties opposed this removal. AT&T did not. Stating that it did not participate in the information services market, AT&T announced that it would take no position on the requests to remove the information services restriction.¹⁸ It acknowl-

¹⁶ Response of the United States to Public Comments on Proposed Modification of Final Judgment, at 62 (filed May 20, 1982); *see* 552 F. Supp. at 195.

¹⁷ Ameritech's Motion For Removal of Certain of the Decree's Line-Of-Business Restrictions (filed Apr. 24, 1987) (App. 298a); Motion of Bell Atlantic to Remove Portions of the Line of Business Restrictions Contained in the AT&T Consent Decree (filed Apr. 24, 1987) (App. 291a); BellSouth Corporation's Motion For Relief Under Section II(D) of the Modification Of Final Judgment (filed Apr. 27, 1987) (App. 293a); Motion of NYNEX Corp. to Remove Restrictions Imposed By Section II(D) Of The Modification Of Final Judgment (filed Apr. 27, 1987) (App. 295a); Motion of Pacific Telesis Group For Waiver of the Line Of Business Restrictions (filed Apr. 27, 1987) (App. 297a); Motion of Southwestern Bell Corporation For Removal of Certain Of The Restrictions Of Section II(D) Of the Modification Of Final Judgment (filed Apr. 27, 1987) (App. 299a); Motion of U S West, Inc. For Relief From Line Of Business Restrictions Imposed By Section II(D) Of The Modification Of Final Judgment (filed Apr. 27, 1987) (App. 305a); Motion Of The United States For Partial Removal Of The Line-Of-Business Restrictions Imposed On The Bell Operating Companies By the Modification Of Final Judgment (filed Apr. 27, 1987) (App. 308a).

¹⁸ Transcript of District Court Hearing, July 1, 1987, at 315; AT&T's Comments on the Report and Recommendations of the United States, March 13, 1987, at 111. At the time of the triennial review proceedings, AT&T was itself prohibited by the decree from offering certain information services known as "electronic publishing" services. *See* Section VIII(D) of the decree. App. 285a.

edged, however, that the case for complete relief under the applicable Section VIII(C) standard had not been made.¹⁹

E. The Decision of the District Court

After an extensive proceeding in which the proposed removals were vigorously contested by users and providers of information services, the district court denied the Section VIII(C) motions to remove the information services restriction.²⁰ The court found that the petitioning Bell Companies had not satisfied their Section VIII(C) burden of showing there was "no substantial possibility that the[y] could not, and indeed would not, use their monopoly power to impede competition in the information services market."²¹ The court rejected a "curious observation" appearing in one Bell Company's reply brief that removal should be ordered "without regard to the Section VIII(C) requirements," and held instead that

¹⁹ AT&T's Comments on the Report and Recommendations of the United States, March 13, 1987, at 111. Because Section VIII(C) applied but could not be met, AT&T argued that if relief were to be granted at all, the Bell Companies would have to shoulder the burden, articulated in *United States v. Swift*, 286 U.S. 106, 118 (1932), of demonstrating that the very assumptions of the decree had been undermined by "unforeseen circumstances." AT&T's Reply Comments on the Report and Recommendations of the United States, May 22, 1987, at 17-18. The Bell Companies made no attempt to demonstrate unforeseen circumstances required to modify the decree structure itself.

²⁰ The court also denied the motions to remove the decree's long distance and manufacturing restrictions. *United States v. Western Electric Co.*, 673 F. Supp. at 552, 562.

²¹ 673 F. Supp. at 565. The court did grant motions to vacate the decree's restriction against "non-natural monopoly" services, and it modified the information services restriction to permit Bell Companies to offer "information service gateways." 673 F. Supp. at 587, 599.

“the decree contains a specific standard for modification or removal of its provisions.”²²

F. The Decision of the Court of Appeals

The Department of Justice and the Bell Companies appealed. Challenging the district court’s interpretation of Section VIII(C) itself, the Department did not argue that any other standard should govern. Indeed, at oral argument before the court of appeals, the Department reaffirmed that: “We moved below under VIII(C) all the waivers that we had recommended to the court, again under VIII(C).”²³ The Bell Companies, despite having moved under Section VIII(C), argued that the district court should not have applied Section VIII(C)’s standard to the proposed removal of the information services restriction.

²² 673 F. Supp. at 534 n.34. BellSouth Corporation argued that Section VIII(C) was not applicable “[w]here the Government recommends the modification or termination of a consent decree, and where the parties to the original proceeding consent to that recommendation.” BellSouth Corporation Response To Comments On The Justice Department Recommendations And Memorandum In Support Of Motion For Relief From Section II(D) Of The Modification Of Final Judgment, April 27, 1987, at 2. Despite this argument, BellSouth itself moved for removal of the restriction “pursuant to Section VIII(C)” (App. 293a), and never amended its motion. In responding to BellSouth’s argument, the district court observed:

the law is that “the parties [can] not become the conscience of the equity court and decide for all what [is] equitable and what is not, because the court [is] not acting to enforce a promise but to enforce a statute,” *System Federation v. Wright*, 364 U.S. 642, 652-53, 81 S.Ct. 368, 374, 5 L.Ed.2d 349 (1961), a rule particularly applicable where the decree contains a specific standard for modification or removal of its provisions.

673 F. Supp. at 534 n.34.

²³ Transcript of Oral Argument, at 25; *see generally id.* at 24-29 (Dec. 6, 1989). The Department also advised that since the decree was entered, “the government has repeatedly moved under VIII(C), in an effort to fulfill the terms that it provides.” *Id.* at 28.

On April 3, 1990, the court of appeals issued a *per curiam* decision remanding for further proceedings on the decree's information services restriction. *United States v. Western Electric Co.*, 900 F.2d 283, 305-309 (D.C. Cir. 1990); App. 46a-56a.²⁴ The court held that the district court committed reversible error when it applied the test of Section VIII(C)—the only test cited in the motions of the moving parties. The court of appeals first opined that the language of Section VIII(C) “appears to contemplate adversarial testing.” 900 F.2d at 306; App. 49a. The court further concluded that Section VIII(C) applied only to motions challenged by an original party. 900 F.2d at 306; App. 49a-50a; *see also* 900 F.2d at 305-306; App. 47a-49a.²⁵ Because AT&T did not oppose the Bell Companies’ motion to remove the information services restriction, the appellate court concluded that the “district court erred in applying Section VIII(C).” 900 F.2d at 309; App. 55a.

Announcing that it would reject the rule of deference “apparently embraced by other circuits,” the appellate panel gave no special weight to the district court’s interpretation of its own explicit standard for removal of restrictions. 900 F.2d at 294; App. 24a. The appellate court did not even mention the district court’s consistent application of Section VIII(C) to petitions for waiver of the restrictions, including petitions uncontested by any original or intervening party.

²⁴ The appellate court affirmed the district court’s rulings on long distance services and manufacturing. 900 F.2d at 300-305; App. 37a-46a.

²⁵ Although the issue was not presented, the appeals court also suggested that the Government cannot properly move under Section VIII(C) to change the line-of-business restrictions. 900 F.2d at 294; App. 25a. The appeals court declined to clarify what standard would apply to government motions to modify the line-of-business restrictions. 900 F.2d at 294 n.12; App. 25a.

In place of Section VIII(C)'s explicit standard, the court of appeals imposed a "public interest" test with a principal characteristic of "*flexibility*." 900 F.2d at 309 (emphasis in original) ; App. 55a. The court deduced this test from the original parties' comments about the proper removal standard, views that were expressed prior to Section VIII(C)'s creation.²⁶ 900 F.2d at 306; App. 50a.

Although the court of appeals' flexible test "must take its meaning from the nation's antitrust laws," that standard "is surely more far-ranging than the section VIII(C) standard." 900 F.2d at 299, 308 (citation omitted) ; App. 53a-54a. Under this flexible test, the district court was instructed to engage in a "*de novo* assessment of the evidence" and "further factfinding" in determining whether to lift the information services restriction. 900 F.2d at 308, 309; App. 53a, 55a. The newly-fashioned "public interest" test "allows the district court to approve an uncontested modification even without a showing of a 'change' of any kind" in the market conditions that the parties agreed necessitated the restrictions when the judgment was entered. 900 F.2d at 306 (footnote omitted) ; App. 49a.

Consumer groups, associations, information services companies and other intervenors below filed this petition for certiorari.

²⁶ 552 F. Supp. at 195.

REASONS FOR GRANTING THE WRIT

The District of Columbia Circuit decided an issue of fundamental importance to competition and consumers in a way that is inconsistent with the decision of this Court in *United States v. Atlantic Refining Company*, 360 U.S. 19 (1959). The decision also conflicts, in letter and spirit, with numerous appellate court decisions that accord deference to district court interpretations of consent decrees.

A reviewing court must honor the language of a decree, the practice of the parties consistent with that language, and the trial court's factual determination of the parties' intent. By exempting certain petitions from the decree's explicit provision for removing restrictions, the court of appeals flouted not only the decree's express language but also the fundamental purpose served by inserting that provision in the first place. The district court "explicitly incorporated" that provision "[t]o avoid any question about the appropriate test" for removal of restrictions. 552 F. Supp. at 195. In rejecting Section VIII(C)'s clear-cut standard and substituting its own vague formulation, the court of appeals resurrected the very question the decree sought to avoid.

The magnitude of dislocation risked by the court's startling reinterpretation of the decree makes review of this case a matter of pressing importance. Information services is a rapidly growing, multi-billion dollar industry. This growth depends on the decree's information services restriction, which addressed the risk that information services companies would face discrimination in reaching their customers through the bottleneck of local telephone services. The decree's guarantee of an open, competitive market in fact generated a wave of investment in new services and products by information services companies. The court of appeals' ruling jeopardizes this guarantee and the vigorous economic growth it has

spawned.²⁷ Moreover, the court of appeals' ruling clouds future enforcement of the long distance and manufacturing restrictions, since no one can predict beforehand whether a particular request to alter these restrictions will be judged under the Section VIII(C) standard or some different one.

This Court should not defer resolution of these questions. The court of appeals observed that "[w]hether section VII or section VIII(C) governs an uncontested motion to modify [the-line-of-business restrictions] is not a mere academic question." 900 F.2d at 306; App. 49a. The Bell Companies have claimed that the court of appeals' decision is "a virtual directive to Judge Greene to let the regional Bells enter the information services market."²⁸ Application of the new standard imposed by the court of appeals will alter the conduct of ongoing proceedings in this far-reaching antitrust case. The questions presented involve clear-cut issues of law that do not depend on future factual developments. The record is complete, and principles of judicial economy and fairness to the parties strongly militate in favor of immediate review.²⁹

²⁷ Just three years after the decree became effective, the record before the district court indicated that "the United States has the world's largest, most successful, and most sophisticated information services industry." Comments of ADAPSO (The Computer Software And Services Association), at 47 (filed Mar. 13, 1987). American consumer databases had an annual growth rate of 76% in the years following approval of the decree. Opposition of CompuServe, Inc., at 23 (Mar. 13, 1987). The Department of Justice's consultant in the triennial review found "thousands of national databases, numerous providers of national electronic mail services, and dozens of large timesharing firms." P. Huber, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, at 6.12 (Jan. 1987).

²⁸ *Washington Post*, April 4, 1990, at C-1.

²⁹ See *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *Larson v.*

1. In *United States v. Atlantic Refining Company*, 360 U.S. 19 (1959), this Court held that a reviewing court should affirm the district court's interpretation of a consent decree provision

where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended.

360 U.S. at 23-24. The court of appeals' decision is flatly inconsistent with *Atlantic Refining*.

First, the "normal meaning" of Section VIII(C)'s language supports the district court's application of that section to uncontested as well as contested removal requests. Section VIII(C) states the terms on which "[t]he restrictions imposed upon the separated BOCs . . . shall be removed." Modification of Final Judgment, App. 274a, 285a. Section VIII(C)'s plain language extends to any petition to remove these restrictions.

To reach a contrary result, the court of appeals seized on Section VIII(C)'s requirement of a "showing by a petitioning BOC." The Court interpreted this language as indicating "that [Section VIII(C)] applies only to contested motions for removal" because it "appears to contemplate adversarial testing." 900 F.2d at 295, 306; App. 26a, 49a.

However, the phrase "showing by a petitioning BOC" does not limit Section VIII(C) to contested removal petitions. "Petitioning BOC" simply refers to the Bell Company that wants the relief. Any party seeking relief from a court must petition, or the court will not act. Many, if not most, petitions in our court system are unopposed. Further, courts routinely require a "show-

Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949). See also *Michael v. United States*, 454 U.S. 950, 951-952 (1981) (White, J., dissenting from denial of certiorari).

ing” that even unopposed petitions are appropriate under applicable law. Therefore, the court of appeals had no basis for confining Section VIII(C) to contested petitions. See *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984) (holding virtually identical decree language did not exempt uncontested petitions to remove restrictions).³⁰

The court of appeals not only derived an “adversariness” requirement from Section VIII(C)’s language, but it also mandated that this adversariness could be provided only by original decree parties. The appeals court’s flawed logic thus drove it to find the information services motions “unopposed” despite fierce opposition to them by numerous parties that had been granted full rights to participate as intervenors. The language of Section VIII(C) cannot be stretched to support the court of appeals’ conclusion.

Second, the appellate court ignored six years of history that flatly contradicts the court’s strained distinction between contested and uncontested petitions.³¹ More than

³⁰ The consent decree in that case provided for removal of certain injunctive provisions upon “a showing by Cyanamid” that “the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country.” 719 F.2d at 561. Cyanamid and the government jointly argued that this provision did not apply to uncontested modifications, and that a less demanding “public interest” standard should govern. *Id.* The Second Circuit rejected that argument on the ground that the decree’s plain language did not purport to exempt uncontested petitions from the decree’s express test for modification.

The decree provisions in this case are indistinguishable. In both cases, the decrees: (i) provided an express standard for removing restrictions; (ii) contemplated a petition to the court for relief; (iii) did not explicitly exempt uncontested petitions from the express standard; and (iv) contained a separate provision retaining jurisdiction in the district court to modify the decree.

³¹ The court of appeals need not and should not have gone beyond the normal meaning of the decree’s language. But once it did so, it should not have disregarded what the parties did after agreeing to the decree.

one hundred thirty petitions to waive or remove line-of-business restrictions have been reviewed under Section VIII(C). All but a handful were uncontested by any original decree party. Yet each was resolved under Section VIII(C) *without any objection* to application of the Section VIII(C) standard. Indeed, since the decree's adoption the Department of Justice and the Bell Companies have repeatedly advocated application of Section VIII(C) to line-of-business waiver or removal petitions, whether contested or uncontested.³²

The court of appeals accorded no significance to this six year history, yet, as *Atlantic Refining* admonishes, the parties' unquestioning adherence to a district court interpretation of a consent decree is powerful evidence that the interpretation is the one intended. The court of appeals plainly erred when it altered a district court interpretation "adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start." 360 U.S. at 23-24.

Third, the court of appeals cavalierly reversed the district court's conclusion that "in fact" Section VIII(C) was intended to govern all requests to remove the line-of-business restrictions. In its triennial review decision, the district court rejected as "curious" the argument that the original parties' concurrence could withdraw the information services motions from Section VIII(C). 673 F. Supp. at 534 n.34. To the contrary, the district court observed, "the decree contains a specific standard [Section VIII(C)] for modification or removal", which the court must enforce regardless of the parties' agreement. *Id.*

³² Every motion under review in this proceeding is expressly based on Section VIII(C). To reach its intended result, the court of appeals found it necessary to fault the district court for adjudicating these requests under the very standard that the moving parties invoked. See p. 10 *supra* and note 17.

Not only did the court of appeals fail to treat the district court's conclusion about the intent of Section VIII(C) as a factual finding, it declined to give any deference to the views of the district court, even though the district court wrote Section VIII(C), incorporated it as a condition of entry of the decree, and interpreted it repeatedly during administration of the decree. The court of appeals unabashedly rejected "the suggestion . . . that this particular district judge's interpretations should be afforded some 'special' deference because he drafted the pivotal provision of the decree, Section VIII(C), and because he has had enormous experience overseeing the case and the decree since its inception." 900 F.2d at 294; App. 24a.

The decision below highlights the danger of an appellate court's refusal to defer to a district judge's long-standing familiarity with a complex consent decree. The appeals court seized on one passage of the district court's 1982 opinion as indicating the "circumstances surrounding formation of the decree,"³³ but it ignored many other clear indications in the contemporaneous record that Section VIII(C) was intended to apply to both contested and uncontested removal applications.³⁴ For example, in adopting Section VIII(C), the district court made clear that "[t]o avoid *any* question about the appropriate test *the*

³³ 900 F.2d at 306; App. 50a.

³⁴ The appeals court focused exclusively on the passage in the district court's opinion referring to a possible standard for opposed motions to remove restrictions, and concluded this was all Section VIII(C) was intended to cover. See 900 F.2d at 306; App. 50a, discussing 552 F. Supp. at 195 & n.266. However, just before the passage in question, the district court had observed that the decree should "contain a mechanism by which [the line of business restrictions] may be removed," an observation not limited to contested motions. 552 F. Supp. at 195. The paragraph cited by the court of appeals also contained references to the Justice Department's expected triennial reports, which might be contested or uncontested. *Id.*

standard for removal of restrictions should be incorporated into the decree." ³⁵

The court of appeals' indifference to the decree's plain language, six years of unquestioned interpretation, and the trial court's finding as to the intended scope of Section VIII(C) cannot be squared with this Court's decision in *Atlantic Refining*.

2. Review by this Court is also needed to clarify the standards appellate courts should apply when reviewing a district court's interpretation of a consent decree. In the present case, the court of appeals took an extremely activist approach to reviewing the district court's order. In its view, the proper standard was review *de novo*, and application of this standard left no room for deference to the interpretation of the district court that drafted the provision at issue and applied that interpretation, without objection, for many years.

The court of appeals' decision on the proper scope of review conflicts with the law of several other circuits—as the court of appeals itself acknowledged. 900 F.2d at 294; App. 24a. In an illustrative case cited below, *see* 900 F.2d at 294; App. 24a, the Ninth Circuit applied a

³⁵ 552 F. Supp. at 195 (emphasis added; footnote omitted). The court of appeals did not mention other important indicia that the original parties' consent would not be given dispositive weight in choosing a removal standard. First, Section VIII(C) originated in the district court's Tunney Act duties to serve as an "independent check upon decrees negotiated by the Department of Justice." 552 F. Supp. at 149. Next, the decree anticipates the possibility that AT&T and the Bell Companies might share economic interests and includes a number of provisions designed to prevent the Bell Companies from favoring AT&T. Modification of Final Judgment, Sections II(A), II(B), IV(F), Appendix B(A)(1); App. 276a, 278a-279a. Finally, the district court's insertion of Section VIII(I), retaining jurisdiction to enforce the decree *sua sponte*, evidences a concern about improper collusion among the original parties that is totally at variance with the court of appeals' conclusion.

contrary rule in cases where the district judge oversaw the litigation resulting in the decree: "In light of the district court's extensive experience with the case and the decree, we should give special deference to its conclusions about the meaning of the decree." *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986).³⁶ At least three other circuits also follow a rule contrary to that applied by the court of appeals in this case.³⁷

This divergence is evidence of a conceptual problem arising from this Court's statement in *Armour* that a consent decree should be treated "essentially as . . . a contract."³⁸ Many courts, including the court of appeals here, have read *Armour* as suggesting that all district court interpretations of consent decree provisions are to be reviewed *de novo*.³⁹ But *Armour* merely admonished

³⁶ *Accord Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 893 (9th Cir. 1982) (deference given to the district court's interpretation of a consent decree because "the district judge oversaw the entire litigation process, from the filing of the original complaint . . . through the consent judgment, to his subsequent interpretation of that judgment.").

³⁷ *AMF, Incorporated v. Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983) (deference to district court's interpretation is due when the meaning of a consent decree is "fairly open to debate"); *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) (district court's interpretation of a consent decree "deserve[s] deference" because "[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it."); *Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984) (district court's "views on interpretation [of a consent decree] are entitled to deference"); *United States v. Board of Educ. of the City of Chicago*, 717 F.2d 378, 382 (7th Cir. 1983); cf. *South v. Rowe*, 759 F.2d 610, 613 n.4 (7th Cir. 1985).

³⁸ *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971) (quoted at 900 F.2d 293; App. 22a).

³⁹ 900 F.2d at 293; App. 22a. Indeed, even courts that defer to district court interpretations of consent decrees pay lip service to the idea that a *de novo* standard of review applies. See, e.g., *Keith v. Volpe*, 784 F.2d at 1461.

courts interpreting consent decrees to remain faithful to the intent of the parties that drafted decree provisions. *Armour* did not involve the appropriate standard of review at all, and in no sense required courts of appeals to forego the obvious wisdom of deferring to the understandings of a district court familiar with the making and administration of a decree.⁴⁰

The *de novo* standard employed by the court of appeals also fails to account for the dual character of consent decrees, which are judicial orders as well as contracts. See *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 519 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-237 (1975). Appellate courts routinely accord substantial deference to a district court's interpretation of orders the court itself has entered.⁴¹

⁴⁰ Indeed, the court of appeals' understanding that *Armour* mandated pure *de novo* review because decrees are "essentially . . . contract[s]" (900 F.2d at 293; App. 22a) caused it to overlook the crucial difference in contract law between review of unambiguous terms, which is governed by a *de novo* standard, and review of ambiguous terms requiring resort to extrinsic evidence. Federal courts view the latter as questions of fact, and apply a "clearly erroneous" standard of review. *E.g.*, *RCI Northeast Services Division v. Boston Edison Co.*, 822 F.2d 199, 202 (1st Cir. 1987); *Scarborough v. Ridgeway*, 726 F.2d 132 (4th Cir. 1984); *G & R Corporation v. American Security & Trust Co.*, 523 F.2d 1164, 1173 (D.C. Cir. 1975); *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1768 (1989); *Tri-State Petroleum Corp. v. Saber Energy Inc.*, 845 F.2d 575 (5th Cir. 1988). In this case the court of appeals found that Section VIII(C) was not clear on its face. 900 F.2d at 306; App. 49a. Although petitioners vigorously dispute the propriety of that conclusion, the appellate court should, at a minimum, have applied a deferential "clearly erroneous" standard of review of the district court's interpretation of Section VIII(C). Thus, to the extent the court of appeals purported to apply standards of review appropriate to contract law, its ruling conflicts with the prevailing standard of review in the federal courts.

⁴¹ See *Vaughns v. Board of Educ. of Prince George's County*, 758 F.2d 983, 989 (4th Cir. 1985) (district court should be presumed

This deference is particularly fitting for decree provisions like the one here drafted by a district court and incorporated into a decree as a prerequisite to judicial approval.

Uncritical application of a *de novo* standard of review to the interpretation of consent decrees invites capricious results that can easily undermine the finality of decrees intended to put an end to litigation and to serve important public policy goals. It also threatens to arrogate too much power to appellate courts distant from the formation and administration of consent decrees. Sound judicial administration would be advanced were this Court to articulate standards of consent decree review that accommodate the particular character of enforcement decrees, that are sensitive to the origin and function of the language that is to be interpreted, and that are respectful of the efforts of district court judges to administer their decrees with coherence and fidelity to contemporaneous understandings that were the basis for the accords.

to know the meaning of its own orders); *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 784 F.2d 831, 834-35 (7th Cir. 1986) ("The district court best knows the meaning of its own orders. The meaning of these documents is reasonably clear; even if it were not, we would defer to the district court's construction of them."); *In re Chicago, Rock Island and Pacific Railroad Co.*, 865 F.2d 807, 810 (7th Cir. 1988) (quoting *Arenson v. Chicago Mercantile Exch.*, 520 F.2d 722, 725 (7th Cir. 1975)) ("We shall not reverse a district court's interpretation of its own order 'unless the record clearly shows an abuse of discretion.'"); *In re Penn Central Transportation Co.*, 486 F.2d 519, 531 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974), ("[T]he district court's interpretation of its own order in the decision appealed from is entitled to great weight. We find no compelling basis to hold otherwise."); *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 499 (3d Cir. 1982) ("We must give particular deference to the district court's interpretation of its own order.").

CONCLUSION

Review by this Court is essential. Administration of the decree affects "a vast and crucial sector of the economy," and information service providers have crafted long-term plans and invested billions of dollars in reliance on the decree's express Section VIII(C) standard for removal of restrictions on the bottleneck monopolists. The court of appeals excised this standard and substituted its own "flexible" test. This Court should correct that error and announce a standard of review that will curb appellate disruption of consent decrees.

For all the foregoing reasons, the petition for certiorari should be granted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWS-
PAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERA-
TION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM
INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO,
THE COMPUTER SOFTWARE AND SERVICES INDUSTRY AS-
SOCIATION, INC., INDEPENDENT DATA COMMUNICATIONS
MANUFACTURERS ASSOCIATION, INC., TANDY CORPORA-
TION, PHONE PROGRAMS, INC., OHIO CONSUMERS' COUN-
SEL, NATIONAL TELECOMMUNICATIONS NETWORK, MARY-
LAND PEOPLE'S COUNSEL, RADIOFONE, INC., AD HOC
TELECOMMUNICATIONS USERS COMMITTEE, COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION,

Petitioners,
v.

UNITED STATES OF AMERICA, BELL ATLANTIC CORPORA-
TION, AMERITECH, NYNEX CORPORATION, SOUTHWEST-
ERN BELL CORPORATION, BELL SOUTH CORPORATION,
PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

APPENDIX TO
**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 6, 1989

Decided April 3, 1990

No. 87-5388

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

PACIFIC TELESIS GROUP, *et al.*,
Appellants

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,
NATIONAL CONSUMERS LEAGUE BLACK CITIZEN
FOR A FAIR MEDIA,
Intervenors

No. 87-5389

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

NYNEX CORPORATION,
Appellant

No. 87-5390

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

US WEST, INC.,
Appellant

2a

No. 87-5391

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

AMERICAN INFORMATION TECHNOLOGIES CORPORATION,

Appellant

No. 87-5392

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

BELLSOUTH CORPORATION,

Appellant

No. 87-5393

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA,

Appellant

No. 87-5394

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,

Appellants

3a

No. 87-5395

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

SOUTHWESTERN BELL CORPORATION,
_____ *Appellant*

No. 87-5396

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

BELL ATLANTIC,
_____ *Appellant*

No. 87-5397

UNITED STATES OF AMERICA

v. *Appellant*

WESTERN ELECTRIC COMPANY, *et al.*

No. 88-5276

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*

BELL ATLANTIC,
_____ *Appellant*

4a

No. 88-5277

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*

SOUTHWESTERN BELL CORPORATION,
_____ *Appellant*

No. 88-5278

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*

PACIFIC TELESIS GROUP, *et al.*,
_____ *Appellants*

No. 88-5279

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*

NYNEX CORPORATION,
_____ *Appellant*

No. 88-5280

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*

AMERICAN INFORMATION TECHNOLOGIES CORPORATION,
_____ *Appellant*

5a

No. 88-5281

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA,

Appellant

No. 88-5282

UNITED STATES OF AMERICA,

v.

Appellant

WESTERN ELECTRIC COMPANY, INC., *et al.*

88-5283

UNITED STATES OF AMERICA,

v.

Appellant

WESTERN ELECTRIC COMPANY, INC., *et al.*

- US WEST, INC.,

Appellant

No. 88-5284

UNITED STATES OF AMERICA,

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*

BELLSOUTH CORPORATION,

Appellant

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 82-00192)

Stephen M. Shapiro, with whom *R. Frost Branon, Jr.* for BellSouth Corporation; *Richard W. Odgers*, *Margaret deB. Brown* and *Stanley J. Moore* for Pacific Telesis Group; *James D. Ellis* and *James S. Golden* for Southwestern Bell Corporation; *Robert A. Levetown* and *John Thorne* for Bell Atlantic Corporation; *Raymond F. Burke* and *Gerald E. Murray* for NYNEX Corporation; *Jeffrey S. Bork* for US West, Inc., *C. Douglas Floyd* and *Frank Cicero, Jr.*, were on the joint brief, for the Regional Telephone Company Appellants. *Abbott B. Lipsky, Jr.* for Bell South Corporation; *Liam S. Coonan* and *Paul G. Lane* for Southwestern Bell Corporation; *Mark J. Mathis*, *James R. Young*, *John M. Goodman* and *Michael D. Lowe* for Bell Atlantic Corporation; *Robert V. R. Dalenberg* and *Martin Silverman* for NYNEX Corporation, also entered appearances for the Regional Telephone Companies.

Laurence H. Tribe, with whom *R. Frost Branon, Jr.* for BellSouth Corporation; *Richard W. Odgers* and *Margaret deB. Brown* for Pacific Telesis Group; *James D. Ellis* and *James S. Golden* for Southwestern Bell Corporation; *Robert A. Levetown* and *John Thorne* for Bell Atlantic Corporation; *Raymond F. Burke* and *Gerald E. Murray* for NYNEX Corporation; *Jeffrey S. Bork* for US West, Inc., *Stephen M. Shapiro*, *Floyd Abrams*, *Abbott B. Lipsky, Jr.*, *C. Douglas Floyd* and *Frank Cicero, Jr.*, were on the joint brief for the Regional Telephone Company Appellants Regarding Information Services. *Liam S. Coonan* and *Paul G. Lane* for Southwestern Bell Corporation; *Mark J. Mathis*, *James R. Young*, *John M. Goodman* and *Michael D. Lowe* for Bell Atlantic Corporation; *Robert V. R. Dalenberg* and *Martin Silverman*

for NYNEX Corporation, also entered appearances for the Regional Telephone Companies.

Alison Leigh Smith, Attorney, Department of Justice, for appellants United States of America. *James F. Rill*, Assistant Attorney General, *Catherine G. O'Sullivan*, *Barry Grossman*, *Nancy C. Garrison* and *Andrea Limmer*, Attorneys, Department of Justice, were on the brief, for appellants United States of America.

Gretchen T. Dumas for appellants The People of the State of California and the Public Utilities Commission of the State of California. *Janice E. Kerr* and *J. Calvin Simpson* also entered appearances for The People of the State of California and the Public Utilities Commission of the State of California.

John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission, with whom *Diane S. Killory*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Linda L. Oliver*, Counsel, Federal Communications Commission, were on the brief for *amicus curiae* urging remand.

Howard C. Davenport, with whom *Gilbert E. Hardy*, *Mary J. Sisak* and *Peter G. Wolfe* were on the brief, for appellant Public Service Commission of the District of Columbia. *Charles A. Tievsky* also entered an appearance for Public Service Commission of the District of Columbia.

Howard J. Trienens, with whom *David W. Carpenter*, *Francine J. Berry* and *Mark C. Rosenblum* were on the brief, for appellee AT&T. *Jonathan S. Hoak* also entered an appearance for AT&T.

Thomas S. Martin, *Chester T. Kamin*, *Michael H. Salisbury*, *Anthony C. Epstein*, *Carl S. Nadler* and *John R. Worthington* for MCI Communications Corporation; *Kenneth E. Hardman* for Comcast Cellular Communications, Inc. (f/k/a American Cellular Network Corpora-

tion); *Peter A. Rohrbach* and *Anthony S. Harrington* for National Telecommunications Network; *Leon M. Kestenbaum*, *Michael B. Fingerhut* and *Philip M. Walker* for US Sprint Communications Company Limited Partnership; *Katherine M. Holden*, *Richard E. Wiley* and *R. Michael Senkowski* for McCaw Communications Companies, Inc.; *W. Theodore Pierson, Jr.*, *Richard M. Singer* and *James W. Smith* for Competitive Telecommunications Association; *Raymond G. Bender, Jr.* and *Laura H. Phillips* for Cybertel Corporation, were on the joint brief, for the Non-AT&T Interexchange and Mobil Services.

Robert F. Aldrich, with whom *Albert Kramer* for North American Telecommunications Association; *Herbert E. Marks* and *James L. Casserly* for Independent Data Communications Manufacturers Association; *John W. Pettit* and *Thomas K. Crowe* for Tandy Corporation; *Sue D. Blumenfeld* and *John L. McGrew* for Telecommunications Industry Association, were on the joint brief of the Manufacturing Appellees.

Gene Kimmelman, with whom *James S. Blaszak* and *Charles C. Hunter* for Ad Hoc Telecommunications Users Committee; *Bruce J. Weston* and *Margaret Ann Samuels* for Ohio Consumers' Counsel; *Gary L. Lieber*, *E. Jay Finkel* and *John M. Glynn* for Maryland People's Counsel; *Ian D. Volner* and *Mark L. Pelesh* for Direct Marketing Association, were on the joint brief of the Telephone Consumers.

E. Barrett Prettyman, Jr., with whom *John G. Roberts, Jr.*, *Richard E. Wiley*, *Michael Yourshaw*, *Katherine M. Holden*, *William B. Baker* and *W. Terry Maguire* for American Newspaper Publishers Association; *Werner K. Hartenberger* and *Laura H. Phillips* for Cox Enterprises, Inc.; *Frank W. Lloyd* and *Diane B. Burstein* for Leghorn Telepublishing Company; *Brenda L. Fox*, *H. Bartow Farr, III*, *Joel I. Klein* and *Robert H. Tiller* for National Cable Television Association, Inc.; *John W. Pettit* and *Thomas K. Crowe* for Phone Programs, Inc.; *Richard E. Wiley* and

Robert J. Butler for Information Industry Association; *Randolph J. May* for CompuServe, Inc.; *Sue D. Blumenfeld* and *John L. McGrew* for The Dun and Bradstreet Corporation; *Henry L. Baumann* and *Robert E. Branson* for National Association of Broadcasters, were on the joint brief for Electronic Publishing Participants.

Joseph P. Markoski for ADAPSO; *Howard D. Polsky* for Alarm Industry Communications Committee; *Stephen R. Bell* for Tymnett-McDonnell Douglas Network Systems Company; *Simon Lazarus, III* for the Computer and Business Equipment Manufacturers Association; *Phillip M. Walker* and *Donald E. Ward* for Telenet Communications Corporation, were on the joint brief Regarding Information Services. *Ann J. LaFrance* also entered an appearance for Tymnet McDonnell Douglas Network Systems Company.

Laurence H. Tribe, with whom *R. Frost Branon, Jr.*, for BellSouth Corporation; *Richard W. Odgers* and *Margaret deB. Brown* for Pacific Telesis Group; *James D. Ellis*, *Liam S. Coonan* and *Paul G. Lane* for Southwestern Bell Corporation; *Robert A. Levetown*, *John Thorne* and *Michael D. Lowe* for Bell Atlantic Corporation; *Raymond F. Burke*, *Gerald E. Murray* and *Mary McDermott* for NYNEX Corporation; *Jeffrey S. Bork* for US West, Inc., *Stephen M. Shapiro*, *Kenneth J. Chesebro*, *Abbott B. Lipsky, Jr.* and *C. Douglas Floyd*, were on the brief, of the Regional Telephone Companies Supporting the Decisions on Information Transmission and Storage Services and Non-Telecommunications Businesses. *Mark J. Mathis*, *James R. Young*, *John M. Goodman* and *Michael D. Lowe* for Bell Atlantic Corporation; *Robert V. R. Dalenberg* and *Martin Silverman* for NYNEX Corporation, also entered appearances for the Regional Telephone Companies.

Martin T. McCue and *Rodney L. Joyce* were on the brief for intervenor United States Telephone Association.

Samuel A. Simon for Black Citizens for a Fair Media, et al.; *Phillip D. Mink* for Citizens for a Sound Economy

Foundation; *Henry Geller* and *Donna Lampert* for *Henry Geller, et al.*, were on the joint brief for intervenors and amici, urging reversal. *Harry M. Shooshan, III* also entered an appearance for *Henry Geller, et al.*

L. Andrew Tollin was on the brief for intervenor *The Media Institute*.

Thomas S. Martin, with whom *John R. Worthington*, *Chester T. Kamin*, *Michael H. Salsbury* and *Anthony C. Epstein* for *MCI Communications Corporation*; *Frank W. Lloyd* and *Diane B. Burstein* for *Leghorn Telepublishing Company*; *Ian D. Volner* and *Mark L. Pelesh* for *Direct Marketing Association*; *Bruce J. Weston* and *Margaret Ann Samuels* for *Ohio Consumers' Counsel*; *Howard D. Polsky* for *Alarm Industry Communications Committee*; *Randolph J. May* for *CompuServe, Inc.*; *R. Michael Senkowski* and *Katherin Holden* for *McCaw Cellular Communications, Inc.*; *Werner K. Hartenberger* and *Laura H. Phillips* for *Cox Enterprises, Inc.*; *Charles H. Helein* and *Laura H. Phillips* for *Enhanced Services Council*; *Peter A. Rohrbach* for *National Telecommunications Network*; *Brenda L. Fox* and *Joel I. Klein* for *National Cable Television Association, Inc.*; *Leon M. Kestenbaum* and *Michael B. Fingerhut* for *US Sprint Communications Company Limited Partnership*; *Herbert E. Marks* and *James L. Casserly* for *Independent Data Communications Manufacturers Association, Inc.*; *John W. Pettit* and *Thomas K. Crowe* for *Tandy Corporation*; *John M. Glynn*, *Gary L. Lieber* and *E. Jay Finkel* for *Maryland People's Counsel*; *Kenneth E. Hardman* for *Comcast Cellular Communications, Inc.*; *Raymond G. Bender, Jr.* and *Laura H. Phillips* for *Cybertel Corporation*; *James S. Blaszak* and *Charles C. Hunter* for *Ad Hoc Telecommunications Users Committee*; *Sue D. Blumenfeld* and *John L. McGrew* for *The Dun and Bradstreet Corporation* and *Telecommunications Industry Association*; *Paul H. Vishny* for *Telecommunications Industry Association*; *Henry L. Baumann* and *Robert E. Branson* for *National Association of*

Broadcasters; *Gene Kimmelman* for Consumer Federation of America; *Joseph P. Markoski* for ADAPSO; *Albert H. Kramer* and *Robert F. Aldrich* for North American Telecommunications Association; *W. Terry Maguire* and *Claudia M. James* for American Newspaper Publishers Association; *Richard E. Wiley*, *Michael Yourshaw*, *Katherine M. Holden* and *William B. Baker* for American Newspaper Publishers Association; *Ashton R. Hardy* for Radiofone, Inc.; *Stephen R. Bell* for Tymnet-McDonnell Douglas Network Systems Company; *W. Theodore Pierson, Jr.* and *James M. Smith* for Competitive Telecommunications Association, were on the joint brief for appellees and intervenors supporting the line of business restrictions.

Alexander P. Humphrey and *Frank W. Krogh* entered appearances for appellee General Electric Communications and Services; *Joseph P. Markoski* and *Herbert E. Marks* entered appearances for appellee Association of Data Processing Service Organization, *Richard E. Wiley*, *R. Michael Senkowski* and *Robert J. Butler* also entered appearances for appellees Telocator Network of America, Association of Telemessaging Services, Int'l, Martin Marietta Corporation, Digital Equipment Corporation, Trintex, Tele-Communications Association, and Information Industry Association.

John L. Bartlett and *Robert J. Butler* entered appearances for appellee Aeronautical Radio, Inc.

Genevieve Morelli entered an appearance for appellee ALC Communications Corporation.

Michael Yourshaw and *Katherine M. Holden* also entered appearances for appellee Teleport Communications.

Henry D. Levine and *Brant S. Karstetter* entered appearances for appellee California Bankers Clearing House, et al.

Arnold J. Barer entered an appearance for appellees Phonequest, Inc., et al.

Alfred Winchell Whittaker entered an appearance for appellee American Information Technologies Corporation.

Lawrence R. Fullerton and *Simon Lazarus, III* entered appearances for appellee Hayes Microcomputer Products, Inc.

Norman P. Leventhal and *Steven N. Muchnick* entered appearances for appellee Digital Directory Assistance, Inc.

Andrew G. Mulitz entered an appearance for appellee Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO).

John H. Chapman entered an appearance for appellee Computer and Communications Industry Association.

Andrew D. Lipman and *Russell M. Blau* entered appearances for appellee David Systems, Inc.

Paul Rodgers, *Charles D. Gray* and *Lisa M. Zaina* entered appearances for appellee National Association of Regulatory Utility Commission.

Milton J. Grossman, *Richard Juhnke* and *Arthur Simms* entered appearances for appellee The Western Union Telegraph Company.

Charles D. Ferris and *Howard J. Symons* entered appearances for appellee Telocator Network of America.

J. Richard Devlin, *Carolyn C. Hill* and *James T. Roche* entered appearances for appellee United Telecommunications, Inc.

Gregory J. Krasovsky entered an appearance for appellee Florida Public Service Commission.

Henry D. Levine also entered an appearance for appellee Association of Data Communication User.

Norton Cutler entered an appearance for appellee NCR Corporation.

Elisabeth H. Ross entered an appearance for appellee Missouri Public Service Commission.

Earle K. Moore entered an appearance for appellees National Council of Churches of Christ in the U.S.A., et al.

Samuel A. Simon also entered an appearance for appellees World Institute on Disability, Inc., et al.

Jerry Berenson and *Kate Martin* entered appearances for appellee American Civil Liberties Union.

Richard E. Wiley also entered an appearance for appellee Prodigy Services Company.

Robert M. Hill, Jr. entered an appearance for appellee Alabama Public Service Commission.

Before: MIKVA, EDWARDS, and SILBERMAN, *Circuit Judges*.

Opinion for the Court filed *Per Curiam*.

Per Curiam: As part of the 1982 consent decree that severed the seven Regional Bell Operating Companies ("BOCs") from AT&T, the parties agreed that the BOCs, which inherited AT&T's local exchange monopoly, would be prohibited from providing interexchange (long distance) or information services, manufacturing telephone equipment, and participating in any non-telecommunications industry. The district judge retained jurisdiction over the case, and the Department of Justice ("DOJ") pledged to report to the court every three years as to the continuing need for these "line of business" restrictions. In the first such "Triennial Review," after considering the DOJ's report, as well as the comments of the other parties and dozens of other individuals and organizations, the district judge issued two opinions lifting the restriction against BOC participation in non-telecommunication businesses, modifying the restriction against their entering the information services market, and leaving intact

the interexchange and manufacturing restrictions. See *United States v. Western Elec. Co.*, 673 F. Supp. 525 (D.D.C. 1987); *United States v. Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988). With the exception of the district judge's ruling dealing with information services—which we reverse and remand—we affirm.

I.

A. *The 1982 Consent Decree*

In 1974, the DOJ filed this antitrust suit against AT&T. After seven years of pretrial proceedings, the case was tried in district court for eleven months but did not culminate in a verdict. Instead, the parties submitted a proposed consent decree to the court for review according to the “public interest” standard prescribed by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“Tunney Act”). After extensive Tunney Act proceedings, and after the parties agreed to certain modifications added by the district judge, the district court approved the decree.¹ See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).²

Although the district court made no explicit findings of liability in the course of the Tunney Act proceedings, it did examine whether the evidence was sufficient to warrant antitrust relief. See 552 F. Supp. at 161. The evi-

¹ Although the district court never determined whether the Tunney Act was technically applicable to this case, the parties consented to have the Tunney Act procedures applied. See *AT&T*, 552 F. Supp. at 145.

² Justice Rehnquist, joined by two other justices, dissented from the Supreme Court's summary affirmance because they questioned whether the application of an undefined “public interest” standard falls within the judicial power under Article III. See 460 U.S. at 1001-06.

dence indicated that AT&T or the "Bell system" was, at the time of the trial, a massive, vertically-integrated enterprise which enjoyed a monopoly in local exchange services, provided long distance service, designed and developed telephone equipment (through Bell Laboratories), and manufactured that equipment at its wholly-owned subsidiary, Western Electric. AT&T used its local exchange monopoly—the so-called "bottleneck"—in a number of ways to promote its own affiliated operations in the long distance and equipment fields. In the interexchange field, other providers such as MCI were dependent on AT&T's local exchange facilities since there was no other way to reach the ultimate consumer. AT&T therefore had a strong incentive to provide more expensive or inferior quality local exchange access to its long distance competitors than it provided to itself. According to the DOJ, despite vigilant FCC attempts to prevent it, AT&T was able to discriminate against its interexchange competitors and, in that way, to stave off significant interexchange competition. *See* 552 F. Supp. at 160-63.

In the equipment market, the BOC's purchased over eighty percent of the nation's central office switches and transmission equipment and nearly always purchased that equipment from AT&T's Western Electric affiliate, even when those products were more expensive or of lesser quality than equipment available from competing vendors. The BOC's and Bell Labs also preferred Western Electric over competitors by granting it early and otherwise advantageous access to technical data and other information about the BOC's equipment requirements. Finally, there was evidence that AT&T cross-subsidized its equipment prices offered by its Western Electric affiliate using its monopoly revenues from local exchange services, thereby enabling Western Electric to undersell its competitors while telephone consumers were effectively overcharged for their local telephone service. Again, all of this was apparently carried out notwithstanding the FCC's best efforts to stop it. *See* 552 F. Supp. at 190-92.

Under the consent decree, AT&T retained its long distance and equipment manufacturing operations but agreed to divest itself of its local exchange monopoly, transferring those operations to the BOCs³ which were to become totally separate from AT&T. In turn, the BOCs were to be limited to the provision of local exchange services and precluded from participating in the markets for interexchange (long distance) services,⁴ equipment manufacturing, information services,⁵ and all other nontelecommunications businesses. See 552 F. Supp. at 227-28. The BOCs were, however, permitted to provide—but not manufacture—customer premises equipment and also to produce, publish, and distribute “Yellow Pages” directories. See 552 F. Supp. at 231. These line of business restrictions were premised on the notion that, because the BOCs still controlled the local exchange bottlenecks, there was a risk that they would engage in the same sort of

³ Under the reorganization plan submitted by AT&T and approved by the court, the 22 BOCs were consolidated into seven Regional Holding Companies. See *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C.), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). For simplicity, we continue to refer to these Regional Holding Companies as the “BOCs.”

⁴ According to section IV(K) of the decree, “‘interexchange telecommunications’ means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area,” 552 F. Supp. at 229. “Exchange areas” are geographic areas of jurisdiction established by the BOCs according to criteria set out in the decree. See *id.*

⁵ Section IV(J) of the decree defines “information services” as: the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

anticompetitive abuses that AT&T had. *See* 552 F. Supp. at 187-191.

Before approving the restrictions, the district judge scrutinized them carefully to ensure "that they will not actually limit competition by unnecessarily barring a competitor from a market." 552 F. Supp. at 186. He rejected as overly simplistic the DOJ's equation of the post-divestiture BOCs with the pre-divestiture Bell System based simply on the proposition that they both possessed a monopoly in local telecommunications. The separated BOCs, the district judge recognized, would be far more manageable monopolists for regulators to oversee than AT&T had been because they would be regional rather than national in scope, they would not be vertically integrated, and, if permitted to enter competitive markets, they would face "the most potent conceivable competitor: AT&T itself." 552 F. Supp. at 187. He therefore ruled that the Tunney Act's public interest standard would permit banning the BOCs from a market only if there was a substantial possibility that the BOCs would use monopoly power to impede competition in that market. 552 F. Supp. at 187. As part of that "public interest" analysis, the district judge undertook a two-part inquiry to determine for each market barred to the BOCs whether (1) the BOCs would actually have the incentive and opportunity to act anticompetitively and (2) whether the participation of the BOCs would contribute to the creation of a competitive market. *See* 552 F. Supp. at 187, 188-94. In addition, the district judge examined the effect of the restrictions on "important public policies." 552 F. Supp. at 187. The district judge ultimately determined that the proposed restrictions were indeed warranted.

The line of business restrictions were not meant necessarily to be permanent, however. The district judge retained jurisdiction⁶ and insisted that a mechanism be

⁶ Section VII of the decree is entitled "Retention of Jurisdiction" and reads:

inserted into the decree for removing them at a later date. Rejecting the DOJ's view that mere monopoly power in local exchange services warranted the restrictions, the district judge thought that removal of the restrictions should be governed by a standard that allows a petitioning BOC to prove that there is no substantial possibility that the BOC could use its monopoly power to impede competition in the relevant market. *See* 552 F. Supp. at 195. The district judge therefore drafted, and the parties agreed to, section VIII(C) of the decree, which reads:

The restrictions imposed upon the separated BOCs by virtue of section II(D) [the line of business restrictions] shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

552 F. Supp. at 231. This removal standard was intended to supplant the "test usually applied to a contested modification of a consent decree," set out in *United States v. Swift & Co.* that asks whether "'unforeseen conditions'" make modification appropriate. *See* 552 F. Supp. at 195 n.266 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)). Whether section VIII(C) would also apply to *uncontested* modifications is a question upon which the district court was silent in 1982.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F. Supp. at 231.

B. *The Triennial Review*

When the decree was entered, the DOJ pledged to report to the court on the third anniversary of divestiture and every three years thereafter on the continuing need for the line of business restrictions. Since divestiture was not actually accomplished until 1984, the first such Triennial Review was held in 1987. The DOJ hired an independent consultant, Peter Huber, to conduct in-depth research on the telecommunications industry as a whole as well as on each of the relevant sub-markets. The *Huber Report* provided the factual basis for the DOJ's preliminary submission, filed with the district court in February 1987, in which it recommended the complete removal of the manufacturing, non-telecommunications, and information restrictions as well as the modification of the interexchange restriction. Quite clearly, the DOJ's position—which conceded the continued existence of the BOCs' local exchange monopoly—represented a significant change from its position when the decree was entered that mere monopoly power in local exchange services necessitated the restrictions.

After studying the comments of the parties and intervenors on its recommendations, the DOJ formally moved the court—apparently under section VIII(C) of the decree—for the removal of all the line of business restrictions, with the exception of the interexchange restriction. The DOJ was evidently persuaded to alter its position on interexchange services, and it instead asked the court to leave the restriction intact but to grant waivers as soon as local regulation in a given area is lifted. The Department believes that the BOCs' bottleneck monopolies persist primarily because of local regulation which, if removed, would allow potentially competitive access alternatives to be made available by new technology. The seven BOCs also filed motions under section VIII(C) of the decree asking for complete removal of all the line of business restrictions.

The district court held proceedings in which interested persons were invited to comment and respond to the report and the motions. With respect to the non-telecommunications and information services restrictions, all of the parties to the original decree—AT&T, the BOCs, and the DOJ—as well as the FCC agreed that the restrictions should be removed.⁷ AT&T opposed any modification of the other restrictions, thus making those BOC motions undeniably “contested.” Not surprisingly, numerous existing participants in the markets that the BOCs sought to enter intervened and vigorously opposed each of the proposed modifications. And, as noted above, the DOJ opposed the complete removal of the interexchange restriction.

After discussing the standard for removal of restrictions under section VIII(C) of the decree, the district judge determined that the BOCs still possessed a bottleneck monopoly over local exchange service. *See* 673 F. Supp. at 536-40. The court then analyzed each line of business restriction to decide whether the BOCs had nevertheless met their burden under section VIII(C) to warrant removal. In reviewing the restriction concerning non-telecommunications businesses, the court noted that it had routinely reviewed and granted requests to waive this restriction since the decree became operational in 1984. Despite losing the safeguards that the waiver process afforded by virtue of the conditions imposed whenever a waiver was granted,⁸ the district court removed the re-

⁷ AT&T stated that it did not oppose information services relief for the BOCs but argued that any modification of that restriction should be made pursuant to section VII of the decree, not under section VIII(C).

⁸ The court normally required the BOCs to operate the competitive business through a separate subsidiary that would obtain its own debt financing. Furthermore, the total net revenues for all non-telecommunications activities engaged in by a single BOC were limited to ten percent of that company's total net revenues. These conditions were designed to minimize the risk of cross-subsidization

striction entirely because potential competitors did not actively oppose the removal and because cross-subsidization is more difficult in enterprises unrelated to telecommunications. *See* 673 F. Supp. at 599. In addition, the court asserted that lifting the restriction would eliminate a significant burden on BOCs' business planning and free the court from unnecessary and detailed oversight of BOC decisions. *See id.*

The district judge left largely intact the decree's so-called "core" restrictions—those regarding interexchange services, manufacturing, and information services. The manufacturing and interexchange restrictions remained completely unchanged since the district court rejected arguments that circumstances had changed since the issuance of the decree so as to justify the BOCs' entrance into those markets under the standard imposed by section VIII(C). The district judge did not grant partial relief to the BOCs on the information services provision but rejected the request of the DOJ and the BOCs to remove the restriction entirely for much the same reasons as he left the manufacturing and interexchange restrictions in place. The court asserted that information services are vulnerable even to slight manipulation and discrimination in access or transmission quality, thereby making it especially easy for the BOCs to use their bottleneck monopolies anticompetitively if they entered the market. *See* 673 F. Supp. at 566. Nevertheless, the information restriction was lifted insofar as it prevented the BOCs from providing transmission of information services generated by others. *See* 673 F. Supp. at 587-97. The district judge described the economic and social advantages of making information services more widely available and noted that the telephone system was perhaps the only means of accomplishing that goal, because it uniquely offers pro-

and to guarantee that the BOCs would not neglect their primary responsibility of providing local telephone service. *See* 673 F. Supp. at 598.

viders a means “to reach large, dispersed audiences over reasonably priced, interactive facilities.” 673 F. Supp. at 564. So long as the BOCs do not compete with the companies that *generate* the information services, the district judge reasoned, they would have an incentive to afford the widest, fastest, and highest quality access and transmission to all information providers, thereby maximizing their own revenues. This determination was further explained and substantially reaffirmed by the district judge following a separate proceeding held to work out the details of the information services restriction. *See* 714 F. Supp. at 1. All of these rulings have been appealed.

II.

A. *Standard of Review*

We have repeatedly held that the construction of a consent decree (indeed of this particular consent decree) is subject to *de novo* appellate review. *See United States v. Western Elec. Co.*, 894 F.2d 1387, 1390 (D.C. Cir. 1990); *United States v. Western Elec. Co.*, 846 F.2d 1422, 1427 (D.C. Cir.), *cert. denied*, 109 S. Ct. 306 (1988); *United States v. Western Elec. Co.*, 797 F.2d 1082, 1089 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 922 (1987); *see also United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). “We read the Decree essentially as we would a contract. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975); *United States v. Western Elec. Co.*, 797 F.2d 1082, 1089 (D.C. Cir. 1986) (“*Western Elec. II*”), *cert. denied*, 480 U.S. 922 (1987). Thus, while the meaning of the Decree’s terms ‘must be discerned within its four corners,’ *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), our inquiry is guided by conventional ‘aids to construction,’ including ‘the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties . . .’ *ITT Continental Baking*

Co., 420 U.S. at 238.” *United States v. Western Elec Co.*, 894 F.2d at 1390.

Appellees nevertheless urge us to employ an “abuse of discretion” standard of review, arguing that what we are reviewing here is the district judge’s decision not to modify the consent decree—subject to review only for abuse of discretion, *see System Fed’n No. 91 v. Wright*, 364 U.S. 642, 647-48 (1961)—rather than his interpretation of the decree. We think that is an inaccurate description of this proceeding. At least insofar as the district court was faced with motions brought under section VIII(C), it was not asked by any appellant to modify the decree; it was asked to apply it. To the limited extent that that process might require the district judge to find facts (for instance, to determine whether the BOCs still possess monopoly power over local exchange services), we would review under a clearly erroneous standard. *Cf. City of Las Vegas v. Lujan*, 891 F.2d 927, 931 (D.C. Cir. 1989). But the legal standard for lifting the line of business restrictions pursuant to a BOC motion is explicitly provided by section VIII(C) of the decree and therefore the district judge need not “balance [any] imponderables,” *Wright*, 364 U.S. at 648, in deciding whether to remove them as he might in a case seeking modification. Indeed, the district court enjoys no equitable discretion at all in applying section VIII(C); if the petitioning BOC makes the required showing, the district court “shall” remove the restriction. Therefore, aside from fact-finding, we owe no deference to the district court’s decisions under section VIII(C). And to the extent that we review the district court’s conclusions about the scope of the applicability of section VIII(C) (as opposed to section VII) for modifications, that is clearly a pure question of law subject to plenary review.⁹

⁹ We need not decide here whether “abuse of discretion” is the proper standard for reviewing the district court’s decisions concerning modification under section VII—where the district judge is

Further, we reject the suggestion—apparently embraced by other circuits, *see, e.g., Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986)—that this particular district judge’s interpretations should be afforded some “special” deference because he drafted the pivotal provision of the decree, section VIII(C), and because he has had enormous experience overseeing the case and the decree since its inception. In addition to our discomfort with the concept that the degree of deference we afford should depend even in part on the identity of a district judge hearing the case blow, we also note that appellate courts do not normally defer to anyone else’s non-contemporaneous interpretations of the Constitution, statutes, cases, or contracts—whether or not the interpreter was also the drafter of the language at issue. When we defer to agency interpretations of their own ambiguous statutes, *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), or of contracts, *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987), we do so on the assumption that Congress delegated to departments or agencies the reconciliation of agency policies implicated in that function—institutional concerns not present when we review district court opinions.¹⁰

B. *Applicability of Section VIII(C)*

Except for some BOC petitions regarding information services, the BOCs and the DOJ brought, and the district court analyzed, all of the motions to lift the line of business restriction under the standard set out in section

apparently called upon to apply a public interest standard. *But cf. Maryland v. United States*, 460 U.S. 1001, 1001-06 (1983) (Rehnquist, J., dissenting).

¹⁰ In interpreting the decree, we do, however, take careful account of the explanatory opinion issued by the district judge at the time the decree was entered, *see* 552 F. Supp. at 131, although we are, of course, not bound by it, *see United States v. Western Elec. Co.*, 846 F.2d at 1429.

VIII(C) of the decree. It is unclear to us, however, that section VIII(C) applies at all to some of those motions. In the first place, section VIII(C) refers to "a showing by the *petitoning* BOC," and thus on its face contemplates only petitions brought by BOCs. The DOJ's hard-line position in favor of the restrictions in 1982 further indicates that when the parties agreed to the decree, none of them contemplated that the DOJ would seek to invoke section VIII(C). We do not see, therefore, how the DOJ can petition for removal of restrictions under section VIII(C).¹¹ That is not to suggest that if section VIII(C) is not available to the DOJ no avenue for requesting modification would be open to it. Section VII explicitly provides for modifications of the decree, and the district court would possess equitable power to modify the decree even if section VII were not included, *see United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932).¹² Furthermore, as a party to the decree, the DOJ's position on any BOC petition would be considered by the district court in much the same way as is an intervenor's views—whether it supports or opposes the petition. Strictly speaking,

¹¹ When pressed at oral argument about the applicability of section VIII(C) to DOJ motions, counsel for the Department stated, surprisingly, that the Government had "no position" on the matter, noting that the Court had "not asked [the Department] to argue" that issue.

¹² The Government *opposed* the modification sought in *Swift*, and therefore it is not at all clear to us that the stringent, so-called "unforeseen conditions" test of *Swift* would apply to motions brought by the DOJ under section VII. Since the DOJ is, as plaintiff, the "Prime Mover" of this case, it may well be that modifications it seeks should be evaluated under a standard somewhat more akin to the "public interest" test of the Tunney Act. Still, it is true that the line of business restrictions were part of what AT&T bargained for in the original decree, therefore suggesting that the modification requests that AT&T opposes should perhaps be viewed differently from those that all the parties agree to. We need not pass judgment on this issue here since the DOJ brought no motion under section VII.

however, only the BOCs can be petitioners under section VIII(C).

We also believe that section VIII(C) does not apply to proposed modifications that are agreed to by all the parties to the decree, such as the motions for removal of the restrictions on BOC entry into the information services field. Section VIII(C) speaks of a "*showing* by the *petitioning* BOC," thereby indicating that it applies only to contested motions for removal—and this reading comports with the intent of the parties as expressed to the district court in 1982. *See infra* Part III.C.1. As we explain more fully in Part III of this opinion, uncontested motions for modification—those involving the information services and non-telecommunications businesses restrictions—should be treated by the district judge under section VII of the decree, and should be approved so long as the modifications satisfy the "public interest" standard embodied in the Tunney Act. Thus, while both the district judge and the parties treated the removal of the line of business restrictions as though it were governed entirely by section VIII(C), that section was really the appropriate standard only for the BOC petitions for removal of the manufacturing and interexchange restrictions—the former opposed by AT&T and the latter by both AT&T and the DOJ.

C. *The VIII(C) Standard*

The proper construction and application of section VIII(C) is nonetheless critical in reviewing the district court's decision not to remove the manufacturing and interexchange restrictions. There is no dispute, at least not on appeal, that the BOCs still possess their bottleneck monopolies in local exchange services. Despite certain technological innovations, only a minute percentage of telephone users can bypass the local exchange carriers for any of their calls. *See* 673 F. Supp. at 536-40. The question under VIII(C), then, is whether any petitioning

BOC has made a showing "that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." Given the enormous legal resources expended on the issue, it is hardly surprising that the parties hotly dispute the meaning of the quoted phrase and the proper scope of the district judge's inquiry in deciding whether the standard has been met. According to both the DOJ and the BOCs, the district court's analysis suffered from several flaws: (1) misconstruing the actual terms of section VIII(C) quoted above; (2) failing to accord deference to the recommendations and opinions of the DOJ and FCC; and (3) taking into account allegedly irrelevant factors while ignoring or discounting critical changes in the industry since the decree.

We begin with a close parsing of section VIII(C)'s terms. Section VIII(C) requires a BOC to show that there is no "*substantial* possibility that it could use its monopoly power to impede competition." According to the DOJ and the BOCs, the district court altered the decree by implicitly equating the phrase "substantial possibility" with a mere theoretical possibility. Since the BOCs concede that they could always theoretically use their local exchange monopolies to impede competition, they claim that this putative misreading was tantamount to a ruling that retention of the local exchange monopolies precludes relief from the interexchange and manufacturing restrictions under section VIII(C). They base this argument on the district court's statements to the effect that the local monopolies "continue to provide the same basis for anti-competitive activity as they did prior to the Bell System break-up." 673 F. Supp. at 543. While we do not read the district court's opinion, as appellants do, to have amended the decree, *see, e.g.*, 673 F. Supp. at 536 n.42 (explicitly rejecting the contention that "the restrictions are justified by the mere fact that a monopoly exists in an area"), the importance of the word "substantial" should not be minimized. The ultimate burden under sec-

tion VIII(C) remains on the petitioning BOC,¹³ but the requirement that the possibility of using its monopoly power to impede competition be “substantial” relieves the BOC of the essentially impossible task of proving that there is absolutely no way for it to use its monopoly power to impede competition. For example, the district judge’s speculation that the BOCs could impede competition by way of illegal (and perhaps criminal) collusion to divide markets among them according to territory, *see* 673 F. Supp. at 558, would, in the absence of supporting evidence, seem to qualify only as a theoretical possibility.

The parties also differ markedly concerning what precisely is meant by section VIII(C)’s ambiguous phrase “*impede competition* in the market it seeks to enter.” According to the DOJ, a BOC cannot impede competition in a given market unless it has market power—the ability to restrict output and/or raise prices. AT&T argues that the district court’s 1982 opinion equated impeding competition with “leveraging” monopoly power, something that AT&T claims a BOC can do so long as its local exchange monopoly is also an “essential facility” for the market it seeks to enter. Whatever it means to “leverage” one’s monopoly power, the DOJ is surely correct that no damage to competition—through “leverage” or otherwise—can occur unless the BOCs can exercise market power. *Cf. General Leaseways, Inc. v. National Truck Leasing Ass’n*, 744 F.2d 588, 596 (7th Cir. 1984). To be

¹³ We do not agree with the district judge, however, that the BOCs’ burden is “particularly heavy” because of the litigants’ and the public’s interest in the finality of judgments or because would-be competitors of the BOCs invested “billions of dollars” in reliance on the line of business restrictions. *See* 673 F. Supp. at 533 n.25. Any enterprise that read the decree and the district court’s 1982 opinion could not reasonably have relied on the perpetual enforcement of the line of business restrictions in light of the inclusion of section VIII(C) and the explicit pledge to review the continuing need for the restrictions every three years. And any interest that any party conceivably has in the “finality” of this judgment is necessarily tempered by the same factors.

sure, it may be difficult to decide whether the BOCs would have such power if they were allowed to enter a market. Moreover, it may be necessary to refine the analysis to deal with markets in which self-dealing bias is a risk, such as the production of central office switches and transmission equipment. In those markets, a BOC might be able effectively to raise prices (disguised as costs in the local exchange market) or restrict output—thereby impeding competition—in the segment it controls or forecloses. See *infra* Part III.B. The district court, however, was apparently concerned with the possibility that BOC entry into new markets would disadvantage or destroy small and innovative firms in those markets. See, e.g., 673 F. Supp. at 561 (castigating the DOJ for its indifference to the possible destruction of “many high-quality firms producing high-quality goods that have emerged since divestiture”). New entry or increased competition in any market typically hurts and sometimes even destroys existing competitors. A court’s solicitude for those firms—ostensibly in an effort to foster competition—may well come at the expense of competition. Cf. *Cargill, Inc. v. Monfort*, 479 U.S. 104, 115 (1986). Accordingly, unless the entering BOC will have the ability to raise prices or restrict output in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly power to “impede competition.”

And while there may be some complexities in defining precise boundaries of the relevant market, one thing that is clear from section VIII(C) is that it is the “market [the BOC] seeks to enter” that matters, and *not* the local exchange market. For the most part, then, the district court should decide motions under section VIII(C) without regard to the effect BOC entry into new markets will have on local service ratepayers. Concern for the ratepayers’ welfare is primarily the responsibility of the FCC and state regulators, not the district court. Appellees make much of DOJ’s prior position before the district court when the decree was entered when the Department

urged the court to consider the interests of ratepayers in its evaluation and implementation of the decree. The DOJ concedes the shift, and the only explanation we are given is its statements in two footnotes of its brief that it now believes, contrary to its stance in 1982, that line of business restrictions should not be used—indeed, cannot be used under section VIII(C)—to protect ratepayers of local exchange services rather than solely to protect competition in unregulated markets. While this may have been the DOJ's contention at the time, we see no clear evidence that ratepayer protection was part of the “contemporaneous understandings of [the decree's] purposes,” 846 F.2d at 1427. And, in any event, we believe the text of the decree generally forecloses the goal of ratepayer protection by the use of the words “the market [the BOC] seeks to enter.”

In that regard, to the extent that the district court's consideration of cross-subsidization focused on the danger that the BOCs would overcharge local ratepayers, it was misconceived. *See, e.g.*, 673 F. Supp. at 557, 572. Cross-subsidization is relevant under VIII(C) insofar as it may be used to price below cost in the competitive market, and thereby unfairly to acquire power and impede competition in that market. Still, the impact on the local exchange market of allowing BOC entry into a new market might well be relevant under section VIII(C) if the BOC is likely to be its own primary customer in the entered market, as with production of central office switches and transmission equipment. In that case, cross-subsidization or cost misallocation that allowed a BOC to pass on its (inflated) equipment costs to the local ratepayers would likely be the primary manifestation of market power and might constitute an impeding of competition *in the entered market*. Cf. 3 P. AREEDA & D. TURNER, ANTITRUST LAW, ¶ 726 (1978).

Appellants also fault the district court for failing to give deference to the views of the FCC and the Justice

Department with respect to the BOC petitions under section VIII(C). The Justice Department's interpretation of the law is not normally given deference in a civil or criminal case; in federal courts, departments' and agencies' legal views are deferred to only when they make a determination (either quasi-legislative or quasi-judicial) that has independent legal significance—as opposed to when they act in a prosecutorial role. See *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285 (D.C. Cir.), *aff'd by an equally divided Court*, 110 S. Ct. 398 (1989). Still it must not be forgotten that the Justice Department has the “principal responsibility for enforcing the Sherman Act.” *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 14 (1979). Therefore, although we see no doctrinal basis for the district court to defer to the DOJ's interpretation of the decree or its views about antitrust law, it is to be expected that the district court would seriously consider the Department's economic analysis and predictions of market behavior. Indeed, it would seem that that is precisely why the district judge required the Department to report to the court every three years concerning the continuing need for the restrictions imposed by the decree. See 552 F. Supp. at 195.

Economic analysis and market predictions are not an exact science. Antitrust scholars and courts have changed their views somewhat over the last fifty years concerning the interrelationship of the antitrust laws and market behavior. Compare, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) with *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (overruling *Schwinn* after determining that its *per se* rule against vertical nonprice restraints was not economically sound). Also compare Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977) (arguing that economic efficiency is not the sole goal of the antitrust

laws) *with* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 103-113 (1978) and R. BORK, THE ANTITRUST PARADOX 50-89 (1978) (agreeing that courts should treat antitrust laws as designed solely to advance consumer welfare and efficiency). Consequently, we recognize that the DOJ may change its views—to incorporate different policy concerns—over time. That is not to say that we do not have any sympathy for the district court's attitude toward the DOJ's position changes in this Triennial Review. As we noted above, the DOJ in 1982 wanted the line of business restrictions to remain in place unless and until the BOCs lost their local exchange monopolies. With little warning or explanation, the DOJ completely altered its stance and is now generally hostile toward the restrictions. In the absence of a complete explanation of how and why the DOJ's position had changed, the district judge was understandably uneasy about relying on the DOJ in this first Triennial Review since to do so would be to undo much of the decree after only three years' time.

The FCC's claim to deference is perhaps even more puzzling to analyze. The FCC argues that the district court acted improperly when it evaluated the effectiveness of the FCC's regulatory scheme since that is solely the function of a court of appeals pursuant to direct review as provided by the Communications Act. The problem with this argument is that a court of appeals reviews FCC regulations only if they are challenged and only to ensure that they are not arbitrary and capricious. The district court below, however, was *obliged* to determine ultimately whether the FCC's regulations would effectively prevent the BOCs from using their monopoly power to impede competition in the markets they sought to enter. *Cf.* 846 F.2d at 1433. The very premise of this case was that the FCC could not effectively control AT&T. We think it would therefore have been an abdication of judicial responsibility for the district court to assume that the FCC's regulations would be effective merely because they had not been found to be arbitrary and capricious.

On the other hand, we recognize the institutional anomaly presented by a district judge placed in the position of evaluating the effectiveness of a federal agency's regulatory program. The DOJ, which brought this action based on its view that the FCC was incapable of preventing AT&T's abuse of monopoly power, would appear to be in a better position, both institutionally and practically, to evaluate the FCC's regulatory effectiveness. And, therefore, we would expect the district court to consider the Department's comparative advantage in performing that task. However, two of the principal FCC regulations that bear on this appeal, the *Joint Cost* and the *Computer III* rules, had not been finally implemented at the time this case was submitted to the district court. Thus the DOJ's assessments of those regulations that are in the record of this appeal are necessarily speculative. See, e.g., *infra* notes 16, 17, 21. Rather than hazard our own, necessarily under-informed, appraisal of how these rules have performed in the three years since this case was presented to the district court, we think it is more prudent to await the DOJ's assessment in subsequent Triennial Reviews.¹⁴

Appellants further argue that the district court erred in its application of section VIII(C) by considering factors it should have ignored while ignoring some that it should have considered. Most importantly, appellants take issue with the minimal significance that the district court placed on the break-up of AT&T's local exchange monopoly into seven separate BOCs in deciding whether to lift the line of business restrictions. The decree was premised on the notion that the BOCs would have both the incentive and the ability to use their local exchange monopoly to impede competition in these markets, therefore neces-

¹⁴ Assuming after remand the BOCs are permitted entry into the information services market, we would also expect the DOJ's reports concerning BOC behavior in that market as well as the effectiveness of applicable FCC regulation to be critical in subsequent Triennial Reviews

sitating the line of business restrictions. See 552 F. Supp. at 187. Under section VIII(C), therefore, the BOCs must establish that something is different now from the time when the decree was entered so that they can no longer use their monopoly power to impede competition. Obviously, if all conditions and assumptions remain the same now as when the decree was entered, no relief can be due under section VIII(C).

While we reject the BOCs overly loose reading of the restrictions under section VIII(C), we also reject the appellees' overly rigid interpretation of those restrictions. The appellees appear to insist that the standard under section VIII(C) requires a finding of some *unforeseen* changed circumstances as an ingredient of the petitioners' showing necessary to justify removal of a line-of-business restriction. This construction finds no support in the language of the decree. Rather, the decree provides that a petitioning BOC is entitled to relief under section VIII(C) so long as it can prove that its ability to impede competition is no longer present. It would make no difference whether the circumstances leading to that conclusion were entirely foreseen or even if they could not be discretely identified. Indeed, even if the economic assumptions or market predictions which governed the decree turned out to be in part wrong, the BOCs might thereby be entitled to relief under section VIII(C).

To be sure, as the district court noted, the mere existence of seven BOCs in place of the prior unified Bell System is not by itself a significant factor. Not only was it the very product of the decree, the seven continue to exercise monopoly power in the local exchange market. However, the other conditions in the various telecommunications markets wrought by divestiture and the behavior of the BOCs since divestiture are appropriately considered under section VIII(C), even if they were foreseen by the parties or incorporated into the fabric of the decree. These are not limited to obvious changes such as new com-

petitors that did not exist or were not stable at the time of the decree. The court also may properly consider the manner in which the seven BOCs behave competitively against each other, AT&T, and other firms, as well as the way in which the various markets have evolved since the decree. It was feared, for instance, at the time the decree was entered that the BOCs would favor one another and AT&T over unrelated firms, a concern that now appears unfounded. Also appropriately considered in the section VIII(C) calculus is the asserted existence of "benchmarks" for comparing BOC performance. According to appellants and the FCC, these benchmarks would make it far easier to regulate the BOCs than the old Bell System if the BOCs were permitted to enter other markets. That the "possibility of the existence of benchmarks was necessarily included in the decree assumption which imposed the restrictions," 673 F. Supp. at 547, makes them no less significant under section VIII(C). Indeed, the greater ease with which the FCC can regulate the BOCs merely because they have a monopoly in only one geographic portion of one of the markets controlled by AT&T prior to the decree—although clearly contemplated (and therefore foreseen) at the time of the decree, *see* 552 F. Supp. at 187—is properly considered under section VIII(C). Of course, the district court still legitimately imposes on the petitioning BOCs the burden of making the requisite showing.

Finally, we consider appellants' claim that the district court strayed beyond the competitive analysis mandated by section VIII(C) when it considered the impact of removing the restrictions on various public policies, including the welfare of local ratepayers, innovation in the manufacturing market, the goal of universal telephone service, first amendment values, and the United States' position in international trade. The district court explained its discussion of these factors by noting that "the same standards may be applied in proceedings addressing

continued viability of the restrictions as were used in determining whether the restrictions were to be imposed in the first place.” 673 F. Supp. at 583. We disagree. When the district court entered the decree in 1982, it decided—as it was required to do under the Tunney Act—whether the decree was in the public interest. Whatever the substance of the “public interest” standard, it is surely more far-ranging than the section VIII(C) standard. When a BOC petitions under section VIII(C) for the removal of a line of business restriction, section VIII(C) itself defines the limits of the district judge’s inquiry. If a BOC makes the showing called for by section VIII(C), the district judge may not, for example, deny the motion because of the possible impact on the United States’ balance of trade, or for any other reason not related to the antitrust laws.¹⁵

III.

We turn next to the district judge’s rulings on the BOC motions to remove the interexchange and manufacturing restrictions. As we noted above, the BOC motions to remove these two restrictions were the only motions properly analyzed under section VIII(C) of the decree. We therefore need not separately consider the DOJ’s motions, which were brought explicitly pursuant to section VIII(C), to the extent that those motions are different in substance from the BOC motions.

Despite our disagreements with the district judge concerning the matters described above, we agree that the BOCs did not satisfy their burden in this Triennial Review of showing that there was no substantial possibility that they could use their monopoly power to impede com-

¹⁵ The district judge explicitly stated that his considerations of some of the public policies mentioned above “d[id] not have an actual impact on the Court’s decisions.” 673 F. Supp. at 580. While that disclaimer makes it somewhat unusual that he would include the sections of his opinion expressly dealing with those public policies, we take the district judge at his word.

petition in these markets. On appeal the DOJ and the BOCs focus their criticism on the district court's analysis and the standard it applied. As such, they ask us to remand for reconsideration under the "legally correct VIII(C) standard." Since we conclude that the district court reached the correct results on the motions properly considered under VIII(C), there obviously is no reason to remand those motions to the district court.

A. *Interexchange Services*

The BOCs, supported by the FCC but not the DOJ, argue that the interexchange restriction should be removed in spite of the conceded persistence of their local exchange monopoly—upon which interexchange carriers rely for access to ultimate consumers—because changed circumstances since the decree would prevent them from impeding competition if they were permitted to enter the market. The DOJ opposes the BOCs' petition.

The district court noted that the interexchange market is currently competitive. Even though AT&T still retains a lion's share of the market, there are hundreds of long-distance carriers in the United States, eight of them serving twenty-five or more states. *See* 673 F. Supp. at 550. This apparently undisputed fact leads the district court to the curious observation that "the entry of the [BOCs] into that market is not necessary to give it vitality." *Id.* Section VIII(C) does not put the BOCs in the "Catch-22" that the district judge seems to imply by that statement—that the restriction will not be lifted if the market to be entered is not competitive because the BOC will grab and wield market power nor will it be lifted if the market to be entered is highly competitive because the BOCs' presence is not "necessary." If the market to be entered is sluggish or concentrated, that might be an argument in favor of allowing BOC entry, although it might also make it easier for a BOC to acquire market power. But if the BOC wants to enter a *competitive* market, that is a power-

ful reason to grant the section VIII(C) petition since there is less of a danger that the BOC will be able to seize and wield market power.

Nevertheless, we agree with the district court's conclusion regarding the changes in the interexchange market. The crux of the BOCs' argument is that equal access for all interexchange carriers has been achieved and cross-subsidization eliminated, thus closing off the primary way for the BOCs to acquire market power anticompetitively. This has allegedly come about primarily through FCC regulation that was made more effective by the fragmentation of the Bell System's local exchange monopoly into seven BOCs. As we indicated above, even though the mere existence of the seven BOCs is not a significant consideration under section VIII(C), the break-up is critically important insofar as the FCC has been able to adapt its regulations to the more manageable task of overseeing seven regional monopolies instead of one national, vertically-integrated one. See 552 F. Supp. at 187. On this point, we think the DOJ's assessment of the FCC's regulations is entitled to significant weight. According to the DOJ, those regulations, combined with the BOCs' own equal access plans have "eliminated most of the anticompetitive advantages AT&T formerly enjoyed." At the time this case was before the district court, however, the DOJ asserted that "the FCC's equal access rules are based on the assumption that the BOCs will not provide interexchange services. Thus the FCC has not yet developed rules that would apply the nondiscrimination and cost separation principles of the *Computer III*¹⁶ and *Joint Cost*¹⁷ proceedings to BOC provision of interexchange

¹⁶ 104 F.C.C.2d 958 (1986), *on reconsideration*, 2 F.C.C.Red 3035 (1987), 3 F.C.C.Red 1135 (1988), *appeal docketed sub nom. California v. FCC*, No. 87-7320 (9th Cir. May 28, 1987).

¹⁷ 2 F.C.C.Red. 1298, *on reconsideration*, 2 F.C.C.Red 6283 (1987), *on further reconsideration*, 3 F.C.C.Red 6701 (1988), *petition for review denied sub nom. Southwestern Bell Corp. v. FCC*, No. 87-1764 et al. (D.C. Cir. Mar. 2, 1990).

services.” And until those regulations are adjusted to take account of BOC entry into the interexchange market—entry which would, of course, provide an incentive to deny equal access and to cross-subsidize if possible—the DOJ represents that equal access and proper cost allocation cannot be assured.

The DOJ also points out that violations of the equal access policy are extremely difficult to detect and remedy, *see* 846 F.2d at 1424-25, thereby underscoring the danger of allowing entry before the FCC’s regulations are designed to deal with the problem. Finally, the DOJ warns that the BOCs will have an easier time acquiring market power in the interexchange market than in other markets because many of the firms that began providing interexchange services after the decree have not yet become stable in the highly capital-intensive field. Since the BOCs raise no serious opposition on appeal to any of these points made by the DOJ and since we have no other reason to doubt the DOJ’s assessments, we affirm the district judge’s conclusion that the BOCs failed to show that there was no substantial possibility that they could use their monopoly power to impede competition in the interexchange market.¹⁸

B. *Manufacturing*

The “manufacturing restriction,” imposed by section II(D) (2) of the decree and amended by section VIII(A) is really more properly conceived of as two restrictions. First, it forbids the BOCs from manufacturing (but per-

¹⁸ The BOCs pressed the argument below that the interexchange restriction should be removed because the Justice Department agreed to, and the district court accepted, a consent decree in an antitrust action against GTE that did not include line of business restrictions. *See United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984). This claim was not raised on appeal and so we do not discuss it. We also have no occasion to discuss the suggestion made by the DOJ below, but dropped on appeal, that the restriction should be lifted with respect to cellular radio, paging, and other mobile interexchange services.

mits them to provide) customer premises equipment ("CPE"), which "includes equipment employed on the premises of anyone other than a carrier that is utilized to originate, route, or terminate telecommunications." 673 F. Supp. at 552 n.116. Second, it prohibits the BOCs from manufacturing or providing telecommunications equipment, that is, equipment other than CPE used by a carrier to provide telecommunications services. *See id.* The BOCs petitioned, with DOJ support, for the complete removal of the manufacturing restriction, and the district court left the restriction intact.

1. *Telecommunications Equipment*

The BOCs and the DOJ argue that market changes since the decree and regulatory adaptations to the post-divestiture market warrant removal of the telecommunications equipment restriction. The Justice Department further divides the telecommunications equipment market into separate markets for central office switches and for transmission equipment (primarily metal cable). The DOJ makes the significant concession that any BOC that chooses to manufacture central office switches, either unilaterally or through a joint venture, will buy all (or nearly all) of its requirements from the affiliated producer—thereby foreclosing a certain portion of the market, then whether or not there are economies to be gained from such integration.¹⁹ Nevertheless, the BOCs will not impede competition (although competitors will surely be hurt) in the switch market, it is argued, because large economies of scale would prevent any BOC from remaining in the market solely to sell to itself. Even the largest BOC buyer of switches in 1985 purchased only 1.4 million lines of new switching capacity, about 17 percent of the

¹⁹ This latter admission moots any suggestion that the district court should have balanced the asserted economies of vertical integration against the anticompetitive danger of BOC entry into the market. We express no opinion as to whether such a balance would be the proper subject of litigation in future Triennial Reviews. *Cf.* 673 F. Supp. at 560.

U.S. market. Only two other BOCs purchased over one million switches and two BOCs bought less than 500,000. *Huber Report* at 14.8. The *Huber Report* estimates that switch producers must sell upwards of 1.5 million switches per year to survive and many more to be profitable. *Huber Report* at 14.15-14.16. Of the three major U.S. switch producers, two (AT&T and Northern Telecom) sold over 4.5 million switches in the U.S. in 1985, and perhaps twice that many worldwide. The third (GTE) sold only about 1.5 million switches in 1985 and is losing money in its equipment businesses. *Huber Report*, 14.8, 14.14-14.15. Assuming that there are no joint ventures among BOCs (which the DOJ admits would alter its assessment), the DOJ argues that only a few BOCs would enter the switch market and those that did could not afford to produce idiosyncratic (or overpriced) switches since they would have to attract at least some significant number of non-affiliated buyers who, of course, can choose among many producers.

The DOJ further concedes, however, that the image they convey of the efficient BOC producer of switches is somewhat clouded by the danger of anticompetitive interconnection discrimination and of cross-subsidization. The risk of interconnection discrimination, by which a BOC would design its switches in a way that would favor the BOC's self-produced equipment over rival manufacturers, has allegedly been "substantially decreased" by more effective regulatory control—especially the availability of benchmark comparisons among the BOCs.²⁰ Cross-

²⁰ The DOJ also noted that the so-called "Open Architecture" or ONA requirements, an integral part of the FCC's *Computer III* rules, might provide another obstacle to a BOC's ability to discriminate. When the case was presented to the district court, however, the DOJ represented that "it is unclear just what the impact of ONA on the potential for discrimination will be and how those effects will vary from market to market." For that reason, we do not understand how a court could be expected to rely at all in this Triennial Review on the asserted efficacy of the FCC's *Computer III* rules.

subsidization is a "plausible concern" in the switch market, the DOJ tells us, because of the need to attract a large market share, the extensive shared costs with local exchange services (especially research and development) ("R&D"), and traditional difficulty encountered by regulators in discovering cost misallocations. Indeed, according to the DOJ, a BOC "might not have to produce efficiently to attract its own operating companies as buyers if regulators did not prevent recovery of excessive switch costs." And while the risk of cross-subsidization cannot be eliminated completely, FCC regulation—especially the availability of benchmarks to enforce effective accounting rules—would "significantly mitigate" it.²¹ Finally, the DOJ maintains that a small amount of cross-subsidization would not impede competition in the entered market; rather its primary effect would be to raise the price of local exchange service, a problem that the DOJ suggests is to be handled by regulators and is irrelevant to this proceeding.

The DOJ's assessment of the transmission equipment market is substantially similar to that for central office switches. In the transmission equipment market, as was

²¹ The DOJ also pointed to the FCC's *Joint Cost* proceeding which, it argues, will give the BOCs the incentive to develop accounting rules that are acceptable to the FCC in order to escape from the separate subsidiary requirements for BOC provision of enhanced (information) services and CPE. Whatever merit there might be in this argument—and we note that the district judge thought there was very little—we need not even consider it in this Triennial Review since the *Joint Cost* rules had not been implemented at the time this case was brought. See 673 F. Supp. at 572. Furthermore, we note with some discomfort that at least some of the BOCs were petitioning this court to strike down as arbitrary and capricious one of the central aspects of the *Joint Cost* rules designed to deal with the cross-subsidization problem while simultaneously pointing to the *Joint Cost* rules in this appeal as effectively ending the cross-subsidization danger. See *Southwestern Bell Corp. v. FCC*, No. 87-1764 et al. (D.C. Cir. Mar. 2, 1990).

true of central office switches, any BOC would purchase all or most of its own equipment from its own manufacturing affiliate; not all BOCs would manufacture every type of transmission equipment. There is some danger of discrimination and of cross-subsidization, but, due in large part to the availability of benchmark comparisons, that risk is substantially less than it was prior to divestiture. Among the salient differences is that the market has supported competition even though the BOCs have already been allowed to provide transmission equipment in the form of CPE, and therefore already possesses an incentive to discriminate in interconnection. In addition, cross-subsidization is allegedly less probable than in the switch market because R&D costs, normally the prime source of cross-subsidization, are so low.²²

Even if we did accept the DOJ's market forecasts and regulatory assessments wholesale, it would not suffice to compel removal of the telecommunications equipment restriction under the section VIII(C) standard. As we discussed above in Part II(C), the possibility of self-dealing bias in the telecommunications equipment market poses dangers to competition that do not exist in the other markets the BOCs seek to enter. The DOJ's submissions provide little solace against those dangers. As we noted above, the DOJ "assumes that any BOC that manufactures equipment would purchase substantially all of its requirement from its affiliate," presumably regardless of price or quality. While the BOCs and the DOJ contend that not all BOCs will produce each type of equipment and therefore dispute the district judge's conclusion that the BOCs would foreclose 70% of the telecommunications equipment market, there seems to be no dispute that

²² Conversely, R&D costs are quite high in the fiber-optics sector of the transmission equipment market. Still, the DOJ submits that cross-subsidization is not a primary concern since the BOCs' competitors in that sector could respond in kind to cross-subsidization without suffering any competitive disadvantage.

some substantial portion (5-15%) of the equipment market will be foreclosed.

Such foreclosure, if combined with cross-subsidization, would appear to allow the BOCs, in effect, to raise prices (and therefore exercise a form of market power) in the foreclosed sectors of the equipment market by disguising inflated equipment prices as costs in the local exchange market. *See supra* Part II.C. To be sure, the DOJ advised the district court that FCC regulation would substantially reduce the risk of cross-subsidization. In its own reports on the two principal telecommunications equipment submarkets, the DOJ nevertheless concedes that the BOCs would possess both the incentive *and the ability* to cross-subsidize, at least somewhat. The DOJ and the BOCs nowhere explain, however, why any significant amount of cross-subsidization that, in practical terms, enables the BOCs to charge higher prices for the equipment it produces would not be akin to an exercise of market power that would impede competition in the telecommunications equipment market. At least in this first Triennial Review, it is not enough for the BOCs (independently or through the DOJ) to show that a significant number of stable competitors will be able to survive BOC entry. We think that the BOCs cannot meet their burden under section VIII(C) without also explaining why foreclosure combined with cross-subsidization does not *itself* pose a "substantial possibility that the BOC could use its monopoly power" in the telecommunications equipment market.

2. *Customer Premises Equipment*

The DOJ subdivides the CPE market into the private branch exchange ("PBX") market and the terminal equipment market. While it analyzed those submarkets separately, the DOJ believes—for reasons similar to those offered for the telecommunications equipment market—that BOC entry into both would not threaten competition.

The PBX market is described as “moderately concentrated”—with three major and many minor producers—but nevertheless competitive. The DOJ points out that the BOCs have been permitted to *provide* PBXs (as well as all other forms of CPE) since the decree, and that they therefore have always had the incentive to provide discriminatory interconnection. If allowed to produce PBXs, that discrimination could manifest itself through BOC manipulation of its local network or through discriminatory dissemination of network information. We are assured, however, that the BOCs’ *ability* to discriminate will be blocked, as it has been until now, by numerous obstacles, especially FCC regulation.²³ Similarly, any danger of cross-subsidization in the PBX market is dismissed by the DOJ as negligible.

The DOJ’s argument with respect to the terminal equipment market is based again on the premise that no BOC could successfully discriminate against its rivals, either by way of interconnection or by failing to provide critical network information. Their ability to discriminate is asserted to be undercut somewhat by the advent of PBX use, as well as cellular and paging systems for which the BOCs do not even provide the interconnection with the terminal equipment and which all contribute to the prevalent use of standards in interconnection. Residual risk of discrimination, as well as the risk of cross-subsidization, are adequately prevented by FCC regulation.

While we certainly have some reservations concerning the DOJ’s assessment of the CPE market,²⁴ we are in-

²³ Among the regulations relied upon, however, were the new *Computer III* and *Joint Cost* rules which were not fully implemented at the time this case was submitted to the district court.

²⁴ For instance, we question the DOJ’s reliance on not-yet-final regulations as well as its apparent equation of FCC success in regulating CPE *provision* by the BOCs with its ability to regulate their CPE manufacturing. It would seem that manufacturing offers far greater opportunities for discrimination in interconnection.

clined to think that the question is much closer than it was for telecommunications equipment. Since the BOCs purchase only a minute percentage of the nation's CPE output, there is no risk of the combined cross-subsidization and foreclosure that is so crucial to our decision on telecommunications equipment. Indeed, on appeal, the BOCs and the DOJ complain primarily that when the district judge discussed foreclosure, he did not differentiate between CPE and the various types of telecommunications equipment that the BOCs do purchase themselves in great quantity. While we agree that different competitive concerns should motivate decisions regarding CPE than those regarding telecommunications equipment, we do not perceive that as a reason to upset the district court's decision as it applies to CPE manufacturing. The burden under section VIII(C) is not on the district judge; it is on the petitioning BOCs to show that they can enter certain markets without raising a substantial possibility that they could use their monopoly power to impede competition in those markets. In this Triennial Review, the BOCs petitioned for *complete* removal of the manufacturing restriction, and the DOJ explicitly urged the district judge *not* to distinguish between the two types of equipment in making his decision, because line-drawing between them is so difficult. Given the risks to competition we identified in the telecommunications equipment market, the district court understandably did not allow the entire manufacturing restriction to be removed in this first Triennial Review, and the motions were properly denied.

C. *Information Services*

The BOCs and the DOJ also appeal from the district court's decision not to lift the restriction on "information services" under section II(D)(1), as that restriction is applied to the *generation* of information.²⁵ The district

²⁵ Under the Decree,

"Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retriev-

court found that there had "been no significant, relevant change in" market conditions justifying removal of this restraint under section VIII(C). 673 F. Supp. at 564. Noting that neither the DOJ nor AT&T opposed lifting the information services ban, the BOCs contend that the district court should have reviewed this question under a more flexible "public interest" standard pursuant to section VII. *See supra* note 6. We agree, and hold that the district court erred in applying section VIII(C) to the uncontested motion to remove the line-of-business restriction on information services. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we are constrained to remand the case for further consideration of the BOCs' motion to remove the information services ban in its entirety.

1. *The Applicability of Section VII to Uncontested Motions to Modify a Line-of-Business Restriction Under the Decree*

It is well established that a less demanding standard of review applies to an uncontested motion to modify a consent decree than applies to a contested one. *See generally* Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, 84 MICH. L. REV. 134, 135 (1985). As we have explained, unless the parties have expressly agreed otherwise, an antitrust defendant can prevail on a contested motion to reduce or eliminate its obligations only if it can make "a clear showing of grievous wrong evoked by new and unforeseen conditions." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). But when all parties to a decree assent to a particular modification,

ing, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications service.

Decree § IV(J), *reprinted in* 552 F. Supp. at 229.

the relevant inquiry for the court is whether the resulting array of rights and liabilities comports with the "public interest." See, e.g., *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984); *United States v. National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856, at 64,248 (E.D. Mich. 1985).

Through section VIII(C), the parties expressly altered this "common law" approach to decree modification. The question is *how much* they altered it. According to the BOCs, Section VIII(C) was intended merely to supplant *Swift's* "grievous wrong" standard for *contested* modifications of the decree's line-of-business restrictions; *uncontested* motions to lift these restrictions, the BOCs argue, remain subject to the ordinary public interest standard as incorporated in section VII's general provision for modification of the decree.²⁶ Because neither AT&T nor the DOJ opposed the BOCs' motion to remove section II(D)(1)'s information service restriction,²⁷ the BOCs conclude that the district court should have reviewed their motion under a public interest test rather than under section VIII(C)'s "no-substantial-possibility" test. The appellees reply that section VIII(C) furnishes the exclusive mechanism for modifying the decree's line-of-business restrictions.

²⁶ The DOJ, in contrast, premises its challenge to the district court's information-services ruling solely on the ground that the court misapplied *section VIII(C)*.

²⁷ Although the appellees suggest that AT&T did not *consent* to removal of the Decree's information-services restriction, it is clear from the record that AT&T did not *object* to such a modification of the Decree. See Joint Appendix 2695-96; see also *id.* 1402. The district court did not suggest otherwise. See 673 F. Supp. 534 & n.33 (characterizing AT&T's position as "suggest[ions]" as to alternative "routes with respect to the information services restriction"). For purposes of identifying the proper standard of review, the critical point is that neither AT&T nor the DOJ *opposed* the BOCs' motion.

Whether section VII or section VIII(C) governs an uncontested motion to modify section II(D) is not a mere academic question. By focusing on whether a particular uncontested modification is in the public interest, section VII allows the district court to approve an uncontested modification even without a showing of a “change” of any kind so long as the resulting array of rights and obligations is “‘within the reaches of the public interest’” today. *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *cert. denied*, 454 U.S. 1083 (1981).

To determine whether the parties intended section VII or section VIII(C) to apply to uncontested motions to modify the decrees line-of-business restrictions, we must look first to the text of the decree, and then, if the question remains subject to doubt, to “‘contemporaneous statements of [the decree’s] objectives.’” *United States v. Western Elec. Co.*, 894 F.2d 1387, 1390-91 (D.C. Cir. 1990) (quoting *United States v. Western Elec. Co.*, 846 F.2d 1422, 1427 (D.C. Cir.), *cert. denied* 109 S. Ct. 306 (1988)). This inquiry convinces us that uncontested motions to modify line-of-business restrictions should be resolved pursuant to a public interest standard under section VII.

Contrary to the contentions of the appellees, the applicability of section VIII(C) is not dictated by the plain meaning of its terms. Section VIII(C) does not purport to be the *exclusive* standard for reviewing motions to modify restrictions imposed by section II(D). Indeed, as we have noted above, insofar as section VIII(C) makes removal of a restriction contingent “upon a *showing* by the *petitioning* BOC,” 552 F. Supp. at 231 (emphasis added), this provision appears to contemplate adversarial testing of the relevant issues. At best, section VIII(C) must be deemed to be silent on the question of what standard applies to uncontested motions to remove the decree’s line-of-business restrictions.

The circumstances surrounding the formation of the decree, however, leave little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII. When the parties initially submitted the decree to the district court, the only provision for modification was section VII. In explaining their understanding of that section, both parties stated that "[i]n the event that the parties agree to an amendment of the modification to remove [a line-of-business] restriction, the standard for such removal would be whether it is in the public interest." Brief of the United States in Response to the Court's Memorandum of May 25, 1982 at 32, *reprinted* in J.A. 882; *see* AT&T Brief in Response to the Court's Memorandum of May 25, 1982 at 17-18, *reprinted* in J.A. 849-50 (stating same view).

The addition of section VIII(C) cannot be viewed as altering this understanding. The district court conditioned approval of the decree on adoption of section VIII (C) in order to alter the parties' stated intention that *contested* motions to remove a line-of-business restriction be granted merely upon a finding "that 'the rationale for [the restriction] is outmoded by technical developments.'" 552 F. Supp. at 195 (quoting Brief of the United States in Response to the Court's Memorandum of May 25, 1982 at 32-33, *reprinted* in J.A. 882-83); *see also* AT&T Brief in Response to the Court's Memorandum of May 25, 1982 at 18, *reprinted* in J.A. 850 (expressing same standard). The trial court expressly noted that the standard in section VIII(C) would supplant "[t]he test usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*" 552 F. Supp. at 195 n.266 (emphasis added) (citation omitted). Nothing in the court's opinion suggests that section VIII(C) was designed in addition to displace the parties' agreement that a public interest standard would apply to *uncontested* motions to modify section II(D).

This reading of the decree is further supported by an important general rule of decree construction, namely, the

presumption that the parties, “absen[t] any expressly stated intention to the contrary,” intended to adopt “the ordinary substantive . . . standards that attend decree modification.” *United States v. Western Elec. Co.*, 894 F. 2d 430, 436 (D.C. Cir. 1990). As we have explained, the only *express* intention relating to section VIII(C) was that it would displace the *Swift* test for reviewing contested modifications.

2. *Application of the Public Interest Test to the Motion to Remove the Restriction on Information Services*

Having determined that section VII’s public interest test governs uncontested proposals to modify the decree’s line-of-business restrictions, we must next examine whether the district court’s erroneous reliance on section VIII(C) affected the court’s decision to deny the BOC’s unopposed motion to remove the decree’s restriction on information services. We conclude that it did, and, consequently, we reverse.

As we have indicated, section VII and section VIII(C) involve different inquiries. Section VII’s public interest test directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*. Cf. *Bechtel Corp.*, 648 F. 2d at 666. Section VIII(C) requires the district court to determine whether the petitioning BOC has shown that it could not impede competition in the relevant market as it was believed it could *when the decree was approved*; applying this standard, Judge Greene denied the BOC’s motion to remove the information-services restriction because he found that “[t]here has been no change whatever in” the information services market 673 F. Supp. at 565.

Under only two circumstances could we discount the possibility that the district court would have reached a

different result had it applied section VII rather than section VIII(C). The first would be if the inclusion of the information services restriction was mandatory, not merely permissible, at the time that the decree was adopted. If market conditions or assumptions in 1982 so constrained the range of permissible settlements that *only* a decree incorporating this restriction could have been approved as consistent with the public interest *then*, it would follow that the parties would need to show that those conditions had abated before the court could approve removal of the restriction *today*.

We cannot say, on the record before us at least, that this condition is met. The Government's case in the AT&T antitrust litigation centered exclusively on AT&T's activities in the interexchange-service and equipment-manufacturing markets. *See, e.g.,* COMPETITIVE IMPACT STATEMENTS IN CONNECTION WITH PROPOSED MODIFICATION OF FINAL JUDGMENT, 47 Fed. Reg. 7172 (1982). Indeed, because the 1956 consent decree enjoined AT&T "from engaging . . . in any business other than the furnishing of common carrier communications services," *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246, at 71,138 (D.N.J. 1956), and because relatively few information services were provided to the public before the DOJ moved to reopen that decree in 1974, there really was no record to speak of concerning AT&T's activities in the information services market. The parties agreed to the information services restriction as a precautionary measure in light of uncertainty about how divestiture of AT&T would affect the development of this embryonic market. Under these circumstances, it would not have been legal error for the district court to approve the decree had the parties *not* agreed on their own to include the restriction on information services. Consequently, the district court's bare finding that the BOCs failed to show a *change* in market conditions does not suffice to show that the decree, absent the information

services restriction, would no longer be “‘within the reaches of the public interest.’” *Bechtel Corp.*, 648 F.2d at 666 (quoting *Gillette Co.*, 406 F. Supp. at 716).

The second condition under which we could disregard the district court's reliance on section VIII(C) would be if the record conclusively showed that, regardless of whether the parties were *obliged* to include the information services restrictions in 1982, removing it would be against the public interest now. Because the “public interest” test must take its meaning from the nation's anti-trust laws, see *American Cyanamid Co.*, 719 F.2d at 565, the appropriate question under section VII is whether the proposed modification would be certain to lessen competition in the relevant market. See generally 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 330, at 141-42 (1978) (“To remain consistent with antitrust policy, the court should revise the decree that is shown to lessen competition substantially in present circumstances.”). Purporting to find that the BOCs would have both the incentive and the ability to cross-subsidize the information-service operations of unregulated affiliates and to discriminate against information-service competitors, the district court concluded that removal of section II(D)(1)'s restriction on information services would be *anticompetitive* under current market conditions. 673 F. Supp. at 565-67.

But because we cannot be certain that these findings were not infected by the court's legal error concerning the proper standard of review, we may not rely on them to support the district court's denial of the BOC's motion. See *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). The district court's analysis of the contemporary risk of anticompetitive behavior repeatedly incorporates the failure of the BOCs to show a change in market conditions from those existing when the decree became effective:

There still has been no *significant, relevant change* in the situation.

673 F. Supp. at 564 (emphasis added).

It is necessary next to determine whether, with respect to the provision of information services, the incentive and ability of the Regional Companies to engage in anticompetitive conduct *remains the same* as it was when the decree was entered. The answer is plain. *There has been no change whatever* in this respect since 1984

Id. at 565 (emphasis added).

In short, the reasons cited by the Court in 1982 and in 1984 *are as valid today as they were then*.

Id. at 567 (emphasis added). Consequently, we cannot be sure whether the district court's findings of anticompetitive risk stemmed from its *de novo* assessment of the evidence.

Nor can we say that "the record permits only one resolution of the factual issue[s]" pertinent to determining whether lifting the information-services prohibition would be pro- or anticompetitive. *Pullman-Standard*, 456 U.S. at 292. To be sure, the district court had before it evidence to support its findings on the risk of discrimination and cross-subsidization. But the record also contains considerable evidence cutting the other way. The *Huber Report*, in particular, discounts the prospect of anticompetitive behavior, citing the ability of competing information-service providers to bypass the BOC's local-exchange networks, *see Huber Report* at 6.8, 6.17-6.21, the existence of nontelecommunications substitutes for information services, *see id.* at 6.21-6.23, and the lack of common costs between local-exchange services and *the generation of information*, *see id.* at 6.35.²⁸ Because resolving these dis-

²⁸ As Dr. Huber notes:

[T]he preparation of the information content itself is one activity that [the BOCs] would have notably little opportunity to cross-subsidize. Running a local telephone exchange does not require reporters, copy editors, joke writers, financial analysts, astrologists, or other information-content providers.

Id. at 6.35 (footnote omitted).

puted factual issues "would be wholly inconsistent with the function of an appellate court," *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 980, 984 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985), we are constrained to remand the case for further factfinding, pursuant to the proper legal standard. *See Pullman-Standard*, 456 U.S. at 292.

In sum, we find that the district court erred in applying section VIII(C) rather than section VII's public interest standard to the BOCs' unopposed motion to lift the decree's information-services restriction in its entirety. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we reverse the court's decision and remand the case for further proceedings. In reconsidering the BOCs' motion, the district court should determine whether removal of the information-services restriction as applied to the generation of information would be anticompetitive under *present* market conditions.²⁹ The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will *best* serve society," but only to confirm that the resulting "settlement is 'within the *reaches* of the public interest.'" *Bechtel Corp.*, 648 F.2d at 666 (quoting *Gillette Co.*, 406 F. Supp. at 716) (emphasis added).

²⁹ We are also concerned with the practical difficulty of enforcing a merely *partial* repeal of the information-services ban; as the trial court recognized, significant disputes can be expected to arise concerning whether the BOCs are using their right to transmit the information of others as a cover for generating their own. *See* 673 F. Supp. at 596. Because it is clearly in the public interest to minimize the district court's oversight responsibilities under the decree, *see id.* at 599, the district court on remand should also consider whether the residual anticompetitive risks associated with lifting the restriction on generation of information are sufficiently great to outweigh the administrative burdens on the court of policing this limited prohibition.

IV.

The Public Service Commission of the District of Columbia ("DC-PSC") is the only party that appeals the district court's decision to allow the BOCs to participate in non-telecommunications markets and limited information transmission and storage activities.

The BOCs assert that in the absence of some actual or threatened injury to DC-PSC or some congressional enactment conferring standing, DC-PSC has no right to appeal the district court's decision. DC-PSC responds that it was granted the status of a limited intervenor in the district court proceedings and that it has the right to appeal the district court's judgment. DC-PSC bases this claim on an unclear combination of the following reasons: the district court granted the right to appeal its decision to all limited intervenors; the district court's decision to lift the restrictions at issue will cause DC-PSC to suffer specific injury as consumer and regulator; the law of standing applies only to plaintiffs and not to intervenors; an agency may intervene in an appeal from proceedings that may affect its ability to carry out its statutory functions; and DC-PSC may represent the interests of District of Columbia residents on appeal in a *parens patriae* capacity.

As a preliminary matter, despite the BOCs' assertions to the contrary, DC-PSC was a limited intervenor in both district court decisions under review. By its order dated March 9, 1987, the district court granted DC-PSC's motion for leave to intervene. On October 14, 1988, the district court ordered that all those parties that had been granted limited intervenor status on February 26, 1987 in the proceedings that culminated in the issuance of the September 10, 1987 decision were to be considered limited intervenors for purposes of the decision issued on March 7, 1988. Because DC-PSC's motion to intervene was filed out of time and was granted on March 9 instead of on February 26, the BOCs assert that DC-PSC is not a lim-

ited intervenor with respect to the March 7 decision. Although the BOCs may be technically correct, it would be unduly formalistic for this court to convert an obvious oversight of the district court into an independent basis for barring appeal.

DC-PSC's status as an intervenor does not, however, guarantee that it has standing to appeal the district court's decisions. DC-PSC seems to be under the impression that the district court, by conferring the status of limited intervenor in the proceedings below, can confer standing on DC-PSC in this court to appeal the district court's decisions. The Supreme Court has stated, however, that

[a]lthough intervenors are considered parties entitled, among other things, to seek review by this Court, *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338 (1945), an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.

Diamond v. Charles, 476 U.S. 54, 68 (1986). Thus, because DC-PSC alone challenges the district court's decision to lift the restrictions at issue, this court must determine whether DC-PSC independently satisfies the article III requisites for standing to appeal.

The Supreme Court has held that in order to have standing, a party must demonstrate an injury in fact fairly traceable to the conduct it is challenging and likely to be redressed by the relief it has requested. *Allen v. Wright*, 468 U.S. 737, 751 (1984). While the necessary "injury" is not susceptible to precise definition, it must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and not merely hypothetical, abstract, or conjectural. *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). As noted above, DC-PSC claims to be con-

stitutionally "injured" both as consumer and regulator. We disagree.

DC-PSC's argument that it has standing as a consumer, if accepted, would mean that any consumer of telecommunications service in the country would have standing to challenge the consent decree. This is far too broad; it approaches the kind of diffuse and unparticularized "taxpayer" standing that the Supreme Court consistently has rejected. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-82 (1982).

DC-PSC's claim that it has standing because its regulatory function could be impaired by the removal of the restrictions at issue is equally unpersuasive. It is hard to see exactly how DC-PSC's ability to regulate could be harmed by the district court's judgment. Even though DC-PSC has no power to regulate Bell Atlantic, it does regulate Bell Atlantic's subsidiary, Chesapeake and Potomac Telephone Company ("C&P"). The fact that Bell Atlantic might inappropriately cross-subsidize other businesses by drawing funds from C&P—and thereby reduce the quality or increase the cost of service to C&P's customers—does not impede DC-PSC's power to require C&P to provide reasonably safe and adequate service at just and reasonable rates to its customers. DC-PSC may claim injury as a regulator only if it can demonstrate that cross-subsidization would prevent it from *regulating* C&P; it has not done so.

Finally, we reject DC-PSC's contentions that it can bring this appeal in a *parens patriae* capacity. Section 15c of Title 15 of the United States Code provides that any attorney general of a state may bring a civil action in a *parens patriae* capacity to secure relief from anti-trust violations. "State attorney general" is defined as

the chief legal officer of a State, or any other person authorized by State law to bring actions under sec-

tion 15c of this title, and includes the Corporation Counsel of the District of Columbia

15 U.S.C. § 15g(1). The BOCs argue that this language means that only the Corporation Counsel is authorized to bring such actions. DC-PSC argues that the grant is not exclusive, because DC-PSC's General Counsel is implicitly authorized to bring § 15c actions by D.C. Code § 43-405, which authorizes the General Counsel "to commence and prosecute all actions and proceedings directed or authorized by the Commission." On balance, we conclude that the general grant of power in § 43-405 is insufficient to authorize § 15c suits by DC-PSC's General Counsel in the absence of some more explicit authorization by Congress or the District of Columbia Council.

V.

With the exception of the district judge's ruling dealing with information services—which we reverse and remand—we affirm.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5388

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*,
PACIFIC TELESIS GROUP, *et al.*,
Appellants

And Consolidated Cases No. 87-5389, 87-5390, 87-5391,
87-5392, 87-5393, 87-5394, 87-5395, 87-5396, 87-5397,
88-5276, 88-5277, 88-5278, 88-5279, 88-5280, 88-5281,
88-5282, 88-5283 & 88-5284

Appeals from the United States District Court
for the District of Columbia

Before: MIKVA, EDWARDS and SILBERMAN, *Circuit
Judges.*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these

causes is hereby affirmed in part and reversed in part and remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: April 3, 1990

Opinion for the Court filed *Per Curiam*

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-0192

UNITED STATES OF AMERICA,
v. *Plaintiff,*

WESTERN ELECTRIC COMPANY, INC., *et al.,*
Defendants.

March 7, 1988

Charles F. Rule, Acting Asst. Atty. Gen., Barry Grossman, Chief, Communications and Finance Section, Nancy C. Garrison, Asst. Chief, Communications and Finance Section, Edward T. Hand, Asst. Chief, Foreign Commerce Section, Ben Giliberti, Atty., Antitrust Div. U.S. Dept. of Justice, Washington, D.C., for U.S. Dept. of Justice.

John D. Zeglis, Jim G. Kilpatrick, Francine J. Berry, Basking Ridge, N.J., Howard J. Trienens, David W. Carpenter, Chicago, Ill., Ben Heineman, Jr., Sidley & Austin, Washington, D.C., for AT & T.

Thomas P. Hester, John Thorne, Ameritech, Jeffrey J. Kennedy, David P. Boyd, Kirkland & Ellis, Chicago, Ill., Donald E. Scott, Alfred Winchell Whittaker, Katherine C. Zeitlin, Kirkland & Ellis, Washington, D.C., for Ameritech.

Robert A. Levetown, John M. Goodman, James R. Young, Washington, D.C., for Bell Atlantic.

Norman C. Frost, Mark D. Hallenbeck, BellSouth Corporation, Atlanta, Ga., Abott B. Lipsky, Jr., King & Spalding, Washington, D.C., for BellSouth.

Raymond F. Burke, Gerald E. Murray, Mary McDermott, Melvin A. Cohen, NYNEX Corp., White Plains, N.Y., for NYNEX.

Robert V.R. Dalenberg, Paul H. White, Kathy A. Hackmann, Richard W. Odgers, Mary Cranston, Pillsbury, Madison & Sutro, San Francisco, Cal., Rex G. Mitchell, Reno, Nev., Stanley J. Moore, Washington, D.C., for Pacific Telesis Group.

Edgar Mayfield, James S. Golden, Mary Whitten Marks, Gregory J. Christoffel, Southwestern Bell Corp., St. Louis, Mo., Liam S. Coonan, Southwestern Bell Corp., Washington, D.C., for Southwestern Bell Corp.

David I. Shapiro, Richard C. Schramm, James vanR. Springer, Joel B. Kleinman, Dickstein, Shapiro & Morin, Washington, D.C. (Laurence W. DeMuth, Jr., Stuart S. Gunkel, David S. Sather, Alan J. Gardner, Cameron R. Graham, of counsel), for U S West, Inc.

Chester T. Kamin, Thomas S. Martin, Michael H. Salsbury, Anthony C. Epstein, Glenn B. Manishin, Christopher S. Vaden, Carl S. Nadler, Jenner & Block, John R. Worthington, Sr. Vice President and Gen. Counsel, MCI Communications Corp., Washington, D.C., and MCI.

OPINION

HAROLD H. GREENE, District Judge.

Under the terms of the decree,¹ the Regional Companies are prohibited from providing "information services." *AT & T*, 552 F.Supp. at 227. An information serv-

¹ *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983) (hereinafter referred to as "*AT & T*, 552 F. Supp.>").

ice is defined as "the offering of a capacity for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications." *Id.* at 229. On September 10, 1987, the Court stated that it was prepared to exempt from the information services restriction the transmission of information generated by others, and it invited the parties and intervenors to submit proposed orders and memoranda detailing with particularity the necessary ingredients of an information transmission system. *United States v. Western Electric Co., Inc.*, 673 F.Supp. 525, 597 (D.D.C.1987) (hereinafter referred to as "Opinion, 673 F.Supp."). A total of some 59 organizations and individuals have filed comments, a number of them several documents (including responses, replies, and the like).

As the Court has had occasion to indicate before, unlike the interexchange and manufacturing issues, which are largely open and shut, the information services questions are closer and more debatable. After carefully considering the matter once again, the Court, for the reasons elaborated on below, has made the following decisions, based upon competitive considerations and upon issues of public policy relating to the economic and social benefits that may be derived from a substantial expansion of information services.

First, the Regional Companies will be permitted to engage in the transmission of information, but the generation of information content, one of the core ingredients of the decree growing out of the *AT & T* case, will continue to be prohibited. Second, for the present, the transmission system to be used will be that delineated in the Court's September 10, 1987 Opinion; however, the Regional Companies may freely develop and use differing applications of that system. Third, the Regional Companies will be allowed to employ alternative transmission systems as and when they are able to propose method-

ology that will in practice preserve the content-transmission dichotomy. Fourth, the Regional Companies will be permitted to enter the voice storage and retrieval markets.

In brief, the Court's decision combines the grant of wide flexibility to the Regional Companies with respect to transmission systems and voice storage applications, with a continued prohibition on the generation and manipulation of information content. It is the Court's expectation that this easing of the information services restriction will avoid anticompetitive effects, and that it will at the same time bring this nation closer to the enjoyment of the full benefits of the information age.

I

Need for Retention of the Restriction on the Provision of Information Content

In the consideration of the papers filed with the Court, it is useful, first of all, to consider, most broadly (1) what it is that the Regional Companies must continue to be prohibited from doing and why, and (2) what segment of the information services market may now be opened to them.

The comments from several Regional Companies indicate that they may not have adequately understood the reasons for the line of business restrictions in the decree. Arguments are advanced again and again that, if only the companies were allowed to enter the markets forbidden to them under the decree, they would be able to innovate unlike independent corporations in the same markets, and that they would be able to improve America's foreign trade position, competing vigorously and effectively with foreign manufacturers and other providers. There are two major reasons why these recurring arguments are not well taken.

At the most elementary level, the Regional Company contentions are irrelevant: the decree provides in so many words that the restrictions² "shall not be removed unless any particular Regional Company makes a showing . . . that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." Section VIII(C) of the decree.

In the context of the triennial review of the decree,³ the Regional Companies supported the Department of Justice motion for, *inter alia*, a complete removal of the restriction on the provision of information services, without distinction between content and transmission. The Court found, however, that the Regional Companies continue to possess bottleneck control over the local exchange facilities,⁴ and that information services are especially vulnerable to even slight manipulation and discrimination by the entity providing transmission. Opinion, 673 F. Supp. at 562-67. Because the requirements of section

² This includes the restriction on the provision of information services in section II(D)(1) of the decree.

³ At the time the decree was entered, the Department of Justice agreed to report to the Court every three years concerning the continuing need for the restrictions imposed by the decree. See *AT & T*, 552 F. Supp. at 195. The first such report was submitted on February 2, 1987. After consideration of that filing, the responses of parties and intervenors, and three days of oral argument, the Court issued the Opinion referred to at p. 2, *supra*, granting in part and denying in part the Department's motion.

⁴ For example, the Court found, based on the studies of the Department of Justice's own expert, that only one-tenth of one percent of inter-LATA traffic volume, generated by one customer out of one million, is carried through non-Regional Company facilities to reach an interexchange carrier. Opinion, 673 F. Supp. at 540. The local monopolies in the various areas where the Regional Companies operate are thus virtually as tight as they were in 1982 when the decree was signed, when the restrictions were first imposed, and when the same bottleneck monopolies were controlled by the Bell System.

VIII(C) had not been met, the Court concluded that the restriction on the sale by the Regional Companies of information content must be maintained. *Id.* at 567. The situation is thus unchanged and, inasmuch as the Regional Companies are unable to make the requisite section VIII(C) showing, they continue as a matter of law to be bound by the section II(D) (1) restriction.

In any event, it is wholly unlikely that the removal of the restrictions would lead to a flowering of research and of more and better competition with foreign producers.

In the first place, the Regional Companies have no experience with the generation of information. The production of and changes in the form of information are the province of hundreds of professions, occupations, and trades, from book publishers to stock market analysts to the providers of theater and music admission tickets. Those involved in these businesses possess the necessary expertise; the Regional Companies do not. It would be absurd to lift the restriction on the provision of information content based on the theory that the Regional Companies know more about and are better able to capitalize on these businesses than those who have made these endeavors their lives' work.

Furthermore, the Regional Companies are not needed in these aspects of American business; they could flourish therein only if they used their telecommunication monopolies to disadvantage competitors in these markets; and their participation therein merely because they are in the business of transmission would be an aberration.⁵

⁵ Interestingly, the French Teletel (*see infra*) operates quite successfully as a transmission system that (1) transmits requests from subscribers for information and (2) furnishes requested material from independent information providers to the requesting parties. Teletel's absence from the information content market is not compelled, as here, by an antitrust judgment, but the French creators

Furthermore, an entry of the Regional Companies into the content-generation markets would be positively harmful. Experience has shown that there is less innovation and hence less effective competition with products manufactured abroad when the significant players in the American market are monopolists than when the participants are free of monopoly pressure and thus have the incentive that exists, in a market characterized by vigorous and broad competition, to lower price and to offer better products.⁶

The American economic system proceeds on the basis of the assumption—closely related to the assumption underlying our political system—that competition is far more likely to lead to the production of more and better products and their distribution to consumers at affordable prices than a market dominated by a monopoly, whether governmental or corporate. In fact, as the Court has previously noted,⁷ more new and innovative telephone products have appeared on the shelves of this country's retailers in the four years since divestiture than in the preceding twenty. It is ironic that, at the very time that

of their system must have known that to make the telephone company a potential competitor for every provider of information in France could only have had disastrous consequences.

⁶ For example, the Court found with respect to manufacturing, where there has been four years of experience in a competitive market to compare against the market dominated by the Bell System monopoly, that "there has been a flowering of research, development, innovation, introduction of new products, and quality assurance; new firms have entered the market; prices of equipment have declined dramatically (according to some by as much as fifty percent in some categories); and competition flourishes in a market that had seen relatively little of it before. The equipment market now consists of some six or eight very large firms, one to two hundred medium-sized firms, and hundreds of still smaller, vigorous and inventive firms, some of them in profitable relationships with one or more of the Regional Companies." Opinion, 673 F. Supp. at 560 (footnotes omitted).

⁷ Opinion, 673 F. Supp. at 601 n.330.

several of America's opponents—*e.g.*, the Soviet Union and the Peoples Republic of China—have finally learned and have begun to implement the lesson that competition is superior to monopoly,⁸ some of the largest American corporations⁹ have been successful in persuading the Department of Justice that a return to monopoly, their monopoly, is in the public interest.

In brief, even if the legal barrier of section II(D)(1) of the decree were not crystal clear, there would be no warrant for a removal of the restriction on the provision by the Regional Companies of the content of information services, one of the core restrictions of the decree. That restriction will accordingly remain.

II

Removal of the Restriction on Information Transmission

In its analysis of the restriction on information services, the Court recognized last fall that substantially different considerations govern Regional Company entry into the transmission aspect of information services, also known as information gateway services,¹⁰ than would their participation in the market for the compilation,

⁸ For reasons similar to those that led to the AT & T divestiture, other nations, *e.g.*, the French, British, and Japanese, have also begun the process of transforming their telecommunications industry into a competitive one on the American model. See *Washington Post*, "Japan's Phone Monopoly Goes Private," April 1, 1985, section A12; *Communications Week*, "New Initiatives in France, Germany May Open Telecom Markets," September 21, 1987, at 1.

⁹ In terms of assets, seven out of twenty of the largest corporations in the United States are the regional telephone companies. In terms of sales, all seven Regional Companies rank in the Fortune 50.

¹⁰ The networks in which these services are performed are also sometimes referred to as value-added networks (VANS).

origination, or manipulation of information. *Opinion*, 673 F.Supp. at 587-97. The potential for anticompetitive behavior by the Regional Companies with respect to transmission only is very much limited, if only because, in the absence of their participation in the generation or manipulation of content, these companies have little incentive for discrimination against competitors in the information market.

Moreover, broad public policies in addition to those stemming from antitrust law favor the elimination of the restriction on transmission.¹¹ The Court has previously found that the efficient, rapid, and inexpensive dissemination of specific information as called for by individuals in all segments of the population will benefit the nation and its economy. *Opinion*, 673 F.Supp. at 589-90. The Court now reaffirms and underlines that finding.

The videotex¹² industry, which has the potential for furnishing wide varieties of information, as needed or wanted, to large segments of the population, has grown only slowly. This is so particularly with respect to the home videotex market. The fact is that, unlike in some

¹¹ In its approval of the decree in this case, the Court took account of such public policies as the congressional expectation of universal telephone service and the desirability under the First Amendment of achieving diversity in the sources of public information. *AT & T*, 552 F.Supp. at 183, 191-94; *see also Opinion*, 673 F.Supp. at 583-87.

¹² The term "videotex" refers to a great variety of easy-to-use interactive data services. According to the Huber Report submitted by the Department of Justice in connection with the triennial review, "videotex arranges information in a text or graphic format on a video display with user input through a keyboard." P. Huber, "The Geodesic Network: 1987 Report on Competition in the Telephone Industry," (hereinafter referred to as the "Huber Report") at 1.29 n. 46. The Department has asserted that the Huber Report formed the principal factual basis for its position in this Court on the decree restrictions.

foreign countries, consumer-oriented videotex services on a substantial scale remain largely in the future in the United States. Opinion, 673 F.Supp. at 587-88.¹³

Yet if consumer-oriented videotex services were made available on a large scale, the economic and social welfare of the American people could be substantially advanced. It is difficult to overestimate the significance of this potential. Information services, as the experience of existing domestic providers and with the foreign system has shown, can come in an amazing scope and variety.¹⁴ If

¹³ Indeed, several efforts to provide videotex services have failed. In March 1986, Knight-Ridder Newspaper Inc.'s viewtron service, which provided home subscribers in several markets with news, stock prices, and shopping information, folded without having made a profit. Around the same time, the Times Mirror Company's gateway videotex services closed down after losing approximately \$30 million. *Washington Post*, "Videotex's Timing is Questioned," March 20, 1986, section E1. However, CompuServe, Inc., a videotex provider, claims to have 375,000 subscribers to its consumer information services at the present time, offering 1,100 consumer information services and data bases.

¹⁴ The Court last fall listed some of the potential information services, as follows:

Without attempting to be exhaustive, the following lists some of the more obvious videotex-related economic services that exist elsewhere and that might be made available in this country: (1) in banking, videotex could give customers direct and immediate account information and fund transfer capability; (2) in brokerage, there could be instant evaluation of current portfolios and access to alternative investment opportunities; (3) with respect to customer service by a variety of business enterprises, arrangements could be made for immediate access to information about outstanding balances, order fulfillment, accrued interest, and the like; and (4) with respect to shopping services, videotex could provide direct and immediate access to the prices and descriptions of a wide range of products and services that could be purchased electronically.

Outside the economic sphere, videotex is used in France, and could presumably be applied in the United States, for such services as (1) travel information, restaurant reviews and

developed to their full potential, these services could in some ways revolutionize American intellectual, social, cultural, and economic life.

In a practical sense, the pervasive services network necessary to create a large and vigorous nationwide market is unlikely to develop without the participation of the Regional Companies.¹⁵ Because of their presence everywhere and their relationship with every user of the telephone, only these companies would be able to furnish the necessary infrastructure components for the distribution of efficient videotex services on an integrated basis; at a minimum they could furnish these components more easily and at less cost than other potential suppliers. Opinion, 673 F.Supp. at 591.

To be sure, some of the requisite services can be and currently are being provided through the customer premises equipment market,¹⁶ and through existing independent videotex suppliers. What is missing, however, is the easy access, both for the providers of information services and for consumers, to a vast, pervasive system that only the local telephone companies, operating in every state of the Union, can readily supply. It is only on that basis that the mass market can be created that

reservations, hotel and rental car information, and airline schedules; (2) instantaneous access to ticketing for sports, musical, cultural, and entertainment events; (3) information concerning meetings of associations, including schedules, performers, and speakers; (4) social messaging; (5) access to federal and local governmental information; (6) language instruction; (7) reprints of newspaper and magazine articles; and (8) employment services.

Opinion, 673 F.Supp. at 589-90 (footnotes omitted).

¹⁵ In this respect, the transmission of information services is unlike the provision of information content, telecommunications manufacturing, and long distance services—all of which can and do function exceedingly well without Regional Company participation.

¹⁶ See Reply of Hayes Microcomputer Products, Inc., at 4.

will allow information services to become available and used on a truly national basis.¹⁷

Beyond that, while entry of the Regional Companies into information gateway services entails some risk to fair competition, such entry, by a group of companies which collectively serve practically every business and household in the country, may actually lead to an increase in competition, as awareness of the services and their potential grows, and as the customer base becomes much more widespread.

Having weighed the wide benefits potentially accruing to the American economy and its consumers against the narrow likelihood of monopolistic behavior on the part of the Regional Companies were they to be permitted to enter¹⁸ the transmission market, the Court concluded on September 10, 1987, that a limited relaxation of the information services restriction was warranted. It is on this basis that the Court announced its intention to modify the decree pursuant to section VIII(C) so as to permit the Regional Companies to compete for the provision of transmission facilities to the information services industry, and that it invited comments from interested parties and intervenors with respect to modes of implementation. Opinion, 673 F.Supp. at 597. Having received and considered these comments, the Court sees no reason to alter its view on the fundamental question at issue.

The Court was and is an enthusiastic supporter of large-scale information services for the benefit particularly of individual consumers and small businesses. Members of these groups will be able to partake of these

¹⁷ Whether such a mass market will actually be created will depend of course on the organizational, technical, and marketing skill of the Regional Companies.

¹⁸ Under the decree as it now stands, the Regional Companies may not perform most of the "gateway" functions necessary to information transmission.

revolutionary new services only if a mass market therefor is established, while vast commercial enterprises generally have access to such services now.

The decree in this case has been responsible for a number of favorable developments: long distance rates have dropped substantially;¹⁹ the price of telephone equipment has similarly been reduced;²⁰ innovations in telephone equipment available to the average person have appeared on retail shelves in astounding numbers and configurations;²¹ and although the Regional Companies, which retain their local monopolies, initially raised local rates, that increase appears to have been largely halted during the current year.

Now would appear to be the time for adding to the achievements built on the competitive market established by the decree a system of broad-based, efficient, reasonably-priced information services available to all who want them. On this basis, the Court will rescind the restriction on the provision of information services in section II(D)(1) of the decree insofar as the transmission of such services is concerned. What remains to be discussed are the specific applications of this decision.

¹⁹ The decrease in rates nationally is estimated at thirty-five percent since divestiture in 1984.

²⁰ Prior to the AT & T divestiture, the Bell System furnished telephones to subscribers only on the basis of an unending monthly rental, without any opportunity for purchase. Now telephone instruments are available for sale in all colors, shapes, and degrees of sophistication, at prices amounting to a small fraction of the total amount of the overall rental fees.

²¹ To cite only the most obvious, features such as automatic call repetition; one-button calling for dozens, even hundreds, of numbers; cordless phones; phones that respond to verbal commands—all of them non-existent or exceedingly rare just three or four years ago—are now commonplace in many households. Mobile phones in automobiles and airplanes are fast coming to match the ubiquity of these features.

III

The Teletel System

In its September 10, 1987 Opinion, the Court relied heavily upon the description of the services provided by Teletel, the French videotex system, in reaching conclusions about the feasibility and the likely structure of information services in the United States. This was so largely because the French system was and is the best known, the most widespread, and the one technologically most advanced, at least on a large scale basis. Moreover, Teletel had been supported by various parties to this litigation as an example of the technological benefits of the Regional Companies could supply if the decree restrictions were relaxed. U.S. West especially²² called the Minitel network "the model upon which we would build" the American system.²³ That company also repeatedly touted the French experience as representing the cutting edge of the Information Age.²⁴

However, the French experience is merely one of the possible permutations that a coherent information services network in this country might take. In the first place, the United States is not France. This country,

²² The U S West proposal was advanced jointly with the Regional Companies' traditional opponent in this field, the American Newspaper Publishers Association. As such, it represented the most substantial and fully considered of the concrete submissions. The proposals of the other Regional Companies were far more diffuse. *See infra*.

²³ Hearing of July 1, 1987, Tr. at 362.

²⁴ In a characteristic reversal of position, U S West dismissed the French Teletel System as already obsolete and not particularly well suited to the American environment, just as soon as the Court appeared to have accepted the original U S West position in its September 10, 1987 Opinion, and as it might have appeared to that company that its demands could therefore be safely ratcheted upward. *See* U S West Memorandum at 2-3.

unlike France, has a healthy and growing personal computer market with which direct interaction will be possible. Also, there has been here some movement into the information services field by non-telephone *enterprises*.²⁵ Most importantly, the French government's subsidization of millions of "dumb" terminals²⁶ would be difficult to duplicate in this country either on a government-subsidy or a telephone company-subsidy basis.²⁷

It is obvious from this discussion that here the most effective method of interconnection between the information providers, through the Regional Companies, to the consumers could turn out to be different, at least in

²⁵ Networks have been developed by entities such as CompuServe, The Source, Trinet, General Electric Information Services, Quantum Computer Services, and the two independent telephone companies, each with its own idiosyncrasy and particular modes of technology.

²⁶ These terminals are relatively inexpensive and unsophisticated, but they are adequate as parts of an information system.

²⁷ Some commentators have suggested that information services will not survive in this country without such a program for the cost-free dissemination of dumb terminals. That may well be the case, but it is not an issue for the Court to decide. The United States government is unlikely to adopt such a policy, and the Court has neither reason nor power to require it or the Regional Companies to do so. This is, to be sure, an option that might be pursued by those interested in entering the market, but it involves a business decision unrelated to questions of antitrust law or enforcement.

In fact, the Court's influence in this matter is limited to resolution of the question whether the Regional Companies will be *permitted* to engage in the transmission of information services. Once such permission is granted, it is solely for the individual companies to determine whether their entry into that market would be economically feasible and otherwise desirable. *See also* note 17, *supra*.

Under the decree, the Regional Companies may not engage in the manufacture of consumer premises equipment, *see* section VIII(A), and dumb terminals fall within that prohibition. Opinion, 673 F.Supp. at 596. However, nothing in the decree would preclude the Regional Companies from providing such hardware to the consumers, if it were obtained from a third source.

theory and in the longer run, from that employed in France, and so could the infrastructure.

Additionally, advances in the communications and computer fields are said to have occurred since the unveiling of the French system, and further and broader advances are likely to occur in the future. On that basis, too, the existing Teletel system should not be cast in concrete as the sole option available to United States providers of transmission services.

IV

Other Alternatives

It was with these considerations in mind that the Court requested the parties to make further submissions following the issuance of the September 10, 1987 Opinion, and it was on that basis that it expected to receive detailed contentions and recommendations both of a legal and a technical nature concerning the requirements of an effective infrastructure for the transmission of information services. Unfortunately, the response was disappointing.

In the first place, the Regional Companies by and large emphasized their determination to have the Court reconsider its September 10, 1987 ruling against removal of the entire restriction on information services, including content. A reprise of that controversy was clearly not the purpose of the post-September round of briefs and, to the extent that this concentration on what had by then become a moot subject consumed space and energy, it was of assistance neither to the authors of the submissions nor to the Court.²⁸

²⁸ The Department of Justice likewise expended much effort on matters already decided. Thus, the Court was told once again that the Department would prefer a complete removal of the information services restriction as of all other restrictions on the Regional Companies; that the Court's imposition of restrictions to prevent anti-competitive activities would amount to an assumption of regulatory

Beyond that, the Regional Companies repeatedly expressed their need and desire for flexibility with regard to their construction of an infrastructure, and some of the companies' submissions begin and end with such a plea. Even memoranda which do provide details, however, do not demonstrate that the flexible authority sought therein would preclude the generation or manipulation of the content of information—the key issue in view of the Court's previous rulings.²⁹ For obvious reasons, the Court may not, consistently with its obligations under the decree, rely for such preclusion on so important a

functions; that requirements of nondiscrimination or of structural separation to prevent cross-subsidies are beyond judicial authority, and the like. *See* Response of the Department of Justice, filed November 16, 1987. In what must be a unique occurrence, at least in this litigation, the Department of Justice actually found the proposal submitted by U S West, a Regional Company not known for the modesty of its ambitions, to be too restrictive. Response of the Department of Justice at 6-9. The Department's position becomes more understandable perhaps when it is considered that its officials met *ex parte* with Regional Company executives regarding the removal of the decree restrictions long before the triennial review (*see* note 3, *supra*) and even long before the Huber Report (*see* note 12, *supra*) was written and submitted.

²⁹ For example, NYNEX proposes that the Court expand permitted infrastructure components to include store and forward, navigation translation, custom screens, and transaction support. Its only justification for this expansion is that those features would "create a network environment that encourages the offering and use of a wide variety of information services." NYNEX Memorandum at 8. NYNEX neglects to explain, however, how the Regional Companies might offer these services without manipulating content. While some of these activities might be accomplished without interfering with content, there is no guarantee that it will be so. Take, for example, credit validation services, which NYNEX would seek to provide as a "transaction support." One method of validation involves the use of computer software to verify the identity of a merchant, route the query to a proper back-end network, log the response, record the data, and send confirmation to the merchant—a clear manipulation of content. Huber Report at 12.7-12.8.

subject on Regional Company self-restraint.³⁰ Authorizing language with technologically amorphous descriptions of what will actually be done constitutes the equivalent of a *carte blanche* to depart from transmission into content, and such a departure, as indicated, cannot be approved.³¹

Having received no submissions that could be regarded as acceptable alternatives to the system tentatively approved last fall, the Court could have decided not to conduct any further inquiry of its own but simply to rest on its existing decision: to permit the use of the Teletel system as described on September 10, 1987, without exploration of other alternatives. However, as pointed out above, it is the Court's belief that information services have a very large potential value for the American public. In view of that consideration, and in view of the possibility that the transmission of such services could be achieved, either now or in the future, by means more advanced, more economical, or both, than those described on September 10, 1987, the Court decided to consider the various other alternatives that appear to exist.

³⁰ Some of the Regional Companies freely acknowledge that their proposals would cross the line between transmission and content. *See, e.g.*, Southwestern Bell's comment that "it is not enough that the telephone network be open only to the accurate transmission of information" (Memorandum at 18), and Pacific Telesis' observation that "[s]ome may claim that our proposed order goes beyond the intent of the Opinion in permitting Regional Company activities" (Memorandum at 1).

As explained in greater detail below, despite the Court's willingness to permit divergences from the teletel model, it will not endorse Regional Company entry into transmission activities absent a showing that these activities will not involve content.

³¹ It may be that some of the parties' submissions are deliberately vague to achieve a quick entry into content, or it may be, on the other hand, that it is not possible to describe the ingredients of an as yet unknown and untried system that is limited to transmission.

A. *Prohibition of Content Generation*

One means of achieving the Court's objective of encouraging the broadest flowering of technology for the transmission of information would be simply to prohibit the generation and manipulation of the content of information, without further definition or explanation. This would authorize the Regional Companies to engage in transmission activities, again without bounds or boundaries, and it would leave completely open the means to be used for in the exercise of the transmission function. This, however, would be impractical for two interrelated reasons.

In the first place, such broad, and unbridled prohibitions and authorizations would almost inevitably lead to an incessant involvement of the Court with the industry. Either the Regional Companies would be flooding the Court with requests for construction of the decree prior to entering fields that could legitimately be regarded as being close to the line between transmission and content,³² or the companies' competitors or potential competitors would be inundating the Court with requests for enforcement or sanctions based upon their perception that the Regional Companies had crossed the line from the permitted to the prohibited.

An alternative to that scenario, and one that likewise cannot be excluded based on past performance, would see the Regional Companies simply resolving all reasonable and unreasonable doubts in their own favor,³³ and enter-

³² As indicated *infra*, some transmission activities necessitate relatively slight changes in content. For that reason, among others, the line between permissible transmission and impermissible generation or manipulation of content is not always obvious.

³³ For example, following the Court's decision with respect to the manufacturing restriction, some of the Regional Companies claimed that they had made elaborate plans regarding research and development preparatory to fabrication, on the theory that this was clearly permitted to them, although the trial record and the Court's

ing the content-based information services market on a wholesale basis, leaving it to the Department of Justice and to the Court to initiate and pursue the enforcement actions necessary to rein these companies into what the decree actually allows. This kind of approach would thus have the perverse effect of substantially increasing rather than decreasing detailed judicial involvement with the telecommunications industry—an obviously undesirable development.

In short, while a simple prohibition on content generation, with an equally simple authorization to engage in transmission, would have the virtue of making the Court's task easier today, for the long run it would sow the seeds of enormous difficulties and disputes, harmful to the parties, to the Court, and to the industry.

B. Electronic Publishing

A somewhat similar approach—one that was suggested by a number of parties, including some Regional Com-

Opinion which described that record clearly showed that research and development had been the facet of manufacturing that was the primary means for Bell System discrimination. *United States v. Western Electric Co.*, 675 F.Supp. 655, 662-63 (D.D.C.1987). One of the Regional Companies, Bell Atlantic, actually claimed that the "decision unlawfully expands the scope of the manufacturing prohibition" and another, Bell South, expressed "utter frustration at a ruling which goes far beyond clarifying any ambiguity" *Telecommunications Reports*, December 7, 1987, at 2. Even the Department of Justice, otherwise entirely in agreement with the Regional Companies, concluded, based on the record, that "manufacturing" includes research and development for purposes of the decree. Opinion, 675 F.Supp. at 664-65.

At least one Regional Company, Southwestern Bell, was found to have engaged in activity which violated the manufacturing restriction when it acquired Tsunami Technologies Corporation. See Report of the United States Concerning Southwestern Bell Corporation's Violations of the Modification of Final Judgment, February 12, 1988.

panies³⁴—would be to make the decree's electronic publishing definition the benchmark of information content. Electronic publishing is defined in section VIII(D) of the decree as:

the provision of any information which AT & T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.³⁵

The suggestion is made that the information services restriction of section II(D)(1) be amended to provide that only the activities encompassed under section VIII(D) remain prohibited. In the eyes of some commentators, this definitional approach will "avoid[] dragging the Court into the endless task of listing the technical capabilities needed for an effective gateway."³⁶ These commentators also emphasize the rapid pace of market and technological change in the industry, and they suggest that unless this method of proceeding is adopted, the Court will be inundated with requests for rulings on a function-to-function basis.

There is some merit to this argument. Simplicity is always a virtue, especially in a case as complex as this. Beyond that, the Court has no desire, nor reason, to become the arbiter of disputes over the merits of the details of particular technologies, nor does it have an interest in establishing a waiver process that would delay the implementation of advances in infrastructure technology.

³⁴ See, e.g., Bell Atlantic Memorandum at 1-2, 3-6; Southwestern Bell Memorandum at 4.

³⁵ Under the decree, the section VIII(D) electronic publishing restriction reins in AT & T. The suggestion presently made is that this restriction be extended to the Regional Companies in lieu of the section II(D)(1) information restriction. See note 39, *infra*.

³⁶ Bell Atlantic Memorandum at 4.

However, while the proposed definition is simple, it is also inexact and underinclusive. "Electronic publishing" is not all that must continue to be prohibited to the Regional Companies, for information content is a wider concept than that. For example, if a Regional Company were prohibited only from entering the electronic publishing business, it could validly offer such services as timesharing, credit checking, and electronic mail, although each of these services involves the generation or manipulation of content and for that reason should remain prohibited to the Regional Companies under any general restriction on content.³⁷ Thus, wholesale adoption of the electronic publishing definition does not constitute an appropriate alternative any more than does the straight prohibition on content.

Moreover, the electronic publishing proposal suffers from the same vice as that discussed under Subpart A, *supra*—it leaves too large a scope for interpretation and hence evasion. It is the Court's experience that, regardless of the level at which a line is drawn between the permissible and the impermissible, the Regional Companies will challenge that line, and either turn to the Court for a ruling or enter the field and await enforcement proceedings, if any. The electronic publishing alternative is therefore rejected.

C. *Detailed Approvals*

For obvious reasons, the Court will not establish a procedure that would avoid altogether the adoption of a definition either of transmission of information or of information content. The adoption of this alternative would require the Regional Companies to apply to the Court, again and again, for a function-by-function approval of relevant technology as such technology may

³⁷ The Court today approves Regional Company entry into the electronic mail market, but this is done after a separate evaluation of that market in a concrete setting.

occur to a Regional Company and as its installation may seem to be called for.

Such an approach would be a certain prescription for paralysis in the information services market. No responsible company would venture to expend capital on the design and installation of a technology if permission for proceeding with various facets was entirely uncertain but had to be applied for and secured some time in the future. Such a micromanagement approach by the Court would also be undesirable from the point of view of the Court and from that of certainty and stability in the industry as a whole.

V

Permitted and Prohibited Transmission Services

Having found unsatisfactory the various alternatives discussed *supra*, the Court will now describe what it is the Regional Companies may and may not do under the newly liberalized information services restriction on the basis of the fundamental decisions made herein.

First. To the extent that the Court has already determined in the September 10, 1987 Opinion that the employment of various infrastructure components is necessary to an effective information gateway, *see* Opinion 673 F.Supp. at 592-95, these components are conclusively presumed to constitute transmission functions that the Regional Companies will be hereafter permitted to perform. No useful purpose would be served by repeating in this Opinion the parameters of these components or functions,³⁸ and the Court hereby adopts their description in the September 10, 1987 Opinion, as modified in Part VI, *infra*.

³⁸ The five functions referred to in the September 10, 1987 Opinion are (1) data transmission, (2) address translation, (3) protocol conversion, (4) billing management, and (5) introductory information content.

Second. The Regional Companies are being granted flexibility also to develop applications of these five components that differ in technology or detail from the Teletel system or the Court's September 10, 1987 description. However, such latitude is only permitted to the extent that (1) all specific restrictions and conditions laid down in the September 10, 1987 Opinion and this Opinion as to scope of the particular categories are observed; (2) no application of these categories involves entry into content-based functions; and (3) the services provided via these five categories of gateway functions are restricted to the transmission of information generated by others.

Third. At the other end of the spectrum, a categorical restriction is being maintained on those aspects of information services that are plainly content-based. These are, at a minimum, the kinds of services that are described in the decree as electronic publishing,³⁹ *see* Part IV-B, *supra*, but they extend, of course, beyond that. *See* pp. 10-11, *supra*.⁴⁰

³⁹ Naturally, the text of this definition will have to be changed slightly to accommodate the present problem, so that the minimum prohibition will read as follows:

... the provision by a Regional Company of any information which that Regional Company or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through telecommunications.

⁴⁰ Among other services that are also clearly outside the transmission function are the maintenance of user profiles and their sale or release to others. *See* U S West Memorandum at 12-14; PacTel Memorandum at 16. Such profiles typically contain detailed information on users' favorite services, times of use, monthly expenditures, and usage habits, which would provide the Regional Companies with an almost insuperable advantage vis-a-vis other providers as a marketing tool. Regional Company control of such data would also raise very sensitive privacy questions. *See* Response of CompuServe at 14-15.

Fourth. It may be that the function of transmitting information without infringing on the content prohibition can be achieved by means of a system or systems using components other than those listed above. The Regional Companies have not suggested any such system or systems thus far,⁴¹ and there is thus nothing before the Court in that regard. However, should such entirely new means to transmit information services without trenching on content be proposed in the future, the Court will consider such proposals sympathetically, in line with its general view of the importance to the public of advanced, broadly-available information services, and its general approach to refrain from straightjacketing the fledgling information services industry by imposing an unnecessarily rigid structure⁴² through which it must develop.⁴³ Such proposals must of course respect the no-content prohibition, and they should not merely constitute rearguments of issues previously rejected by this Court.

⁴¹ It is possible that no transmission functions other than those so described are conceptually or technologically feasible. *See also* note 31, *supra*.

⁴² The direction of technology and the molding of the network must be informed by the whims of the consumer and the state of scientific experience. In order for the United States to develop a vigorous information services network, and to establish and maintain a leadership position in the world market, the Regional Companies should have available the means to design and administer a networking facility. Insofar as this goal is attainable without interfering with the core decree restrictions (*e.g.*, the generation and manipulation of content), the Court will not seek to introduce any artificial hurdles.

⁴³ In this respect, proposals with the imprimatur of the Federal Communications Commission will be considered to be *prima facie* valid, as the Court recognizes that that body, through its studies in *Computer III* and enhanced services, has experience in this field.

VI

Components of Transmission System

As indicated *supra*, the Court is authorizing use by the Regional Companies of a system for the transmission of information generated by others that consists of the five components referred to in the September 10, 1987 Opinion, either in their present form or as appropriately modified. In this part of the Opinion, the Court discusses various questions that have been briefed by the parties regarding the configuration of these components, as well as several ancillary issues.

A. Audiotex and Videotex

In its September 10, 1987 Opinion, the Court focused its analysis of transmission functions on those currently performed by Teletel, since it was that system which had been touted by various Regional Companies as the model through which the United States could enter the Information Age. The French system, however, is limited to videotex—it does not offer the wide range of services that would be available through the complimentary audiotex format.⁴⁴ The Court sees no reason to create a competitive imbalance between voice and other services, and for that reason it will permit the Regional Companies to engage in the transmission of audiotex on the same basis as they may transmit videotex.

Audiotex services are available through ordinary touch-tone telephones, and they therefore have the potential to become the largest and fastest growing segment of the information services market. To date, the widespread application of audiotex has been largely limited to time-of-

⁴⁴ Audiotex allows consumer access to information through a regular telephone line and the use of a touchtone keypad. Huber Report at 6.3 n. 8. Unlike in videotex, the information is not received in written form either on a video display screen or on paper. Huber Report at 1.29.

day information and "976" services,⁴⁵ but expansion of the technical infrastructure could spur a radical transformation in that industry. Many of the services cited in the September 10, 1987 Opinion as ripe for provision over the information services network can easily be provided via vehicles other than videotex,⁴⁶ vehicles that may be equally valuable to a broad range of consumers, if not more so.⁴⁷

Consistent with the goal of making "possible the transmission, on a massive scale, of information services originated by others, directly to the ultimate consumer," Opinion, 673 F.Supp. at 603, then, the Court will make no distinction between videotex and audiotex with respect to Regional Company involvement in the transmission of information services.⁴⁸ Any and all references to videotex,

⁴⁵ "976" services are public announcement services, accessed through the local exchange companies, which provide short, uncomplicated, low-value, mass market information. Information flow is one way—to the user. To encourage frequent, impulse usage, billing is direct to the telephone number, on a per-call basis, without prior subscription. The access lines linking the switches of the information services providers to the public network have a 976 dial code that engages special telephone company billing services. The user is billed an additional per-call amount on his monthly telephone bill; the revenue from that extra charge is divided between the Regional Company and the information service provider. *See* Huber Report at 8.1, 8.3, 8.6.

⁴⁶ Home banking, brokerage, retail services information, messaging, bulletin boards, and other such services are particularly adaptable to audiotex. *See* Opinion, 673 F.Supp. at 589-90.

⁴⁷ Most American consumers already own or rent the access device required by audiotex—the telephone. Thus, audiotex could be enjoyed without the additional expense and bother of obtaining a separate terminal. *See* Response of Public Utilities Commission of California at 3-4.

⁴⁸ Limited objections to this expansion have been expressed by some competing audiotex providers. *See* Phonequest, et al., Response at 3-4. The primary objection of the opponents appears to be that "there is no possible way in which the independents could

either in this Opinion or the September 10, 1987 Opinion, may be construed to include audiotex applications.

B. *Electronic Directory Service*

On September 10, 1987, the Court stated that it would not remove the prohibition against Regional Company provision of electronic "Yellow Pages" directory services because such removal would give the companies the incentive and ability to discriminate against competing providers of directory services and against the publishers of classified and other advertisements. Opinion, 673 F.Supp. at 596. On the other hand, the Court decided that the Regional Companies would be allowed to offer electronic "White Pages" directories with respect to which such an anti-competitive potential did not exist. *Id.* From those simple declarations several Regional Companies have parsed an invitation to engage in the broadest possible electronic directory services, some so broad as to subsume almost all distinctions between White and Yellow pages.

These Regional Companies have interpreted the Court's statements regarding electronic directories as vesting in them the authority to provide electronic directory services that list general product and business categories, the service or product providers under those categories, the names, telephone numbers, and addresses of these providers, as well as services that allow customers to search the directory through the use of any of those categories.⁴⁹ BellSouth would add to these assumed grants of authority the capability to search by geographic location, and it would

compete with the [Regional Companies]." *Id.* at 4. These competitors fail to explain, however, why the potential for anticompetitive behavior is stronger in the audiotex field than in videotex. The mere fact that entry of the Regional Companies into the field will provide stiffer competition is not grounds for excluding them from the market. *See* note 88, *infra*.

⁴⁹ *See, e.g.,* Pacific Telesis Memorandum at 19; Bell Atlantic Memorandum at 18; BellSouth Memorandum at 18.

provide hours of operation, alternative phone numbers, and similar information for business and government listings.⁵⁰ And Bell Atlantic carries these misinterpretations to their ultimate logical conclusion: it suggests that everything except display advertising could be provided under the rubric of "White Pages".⁵¹

Section VIII(B) of the decree grants to the Regional Companies the authority to produce, publish, and distribute printed "Yellow Pages" directories. Yellow Pages are described therein as "directories which contain advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses." As the above discussion indicates, some Regional Companies now expect to have the right to provide electronic directories of that same nature under the label of electronic "White Pages," although they are not permitted to produce electronic Yellow Pages under the decree itself. *AT & T*, 552 F.Supp. at 194. That attempted usurpation of authority was rejected once before, and it is now again rejected.⁵²

The provision of electronic "White Pages" directories encompasses only a listing of telephone subscribers, arranged in alphabetical order by name, with address and telephone number appended. No discrete directory of businesses, products, or services is allowed under the

⁵⁰ BellSouth Memorandum at 18.

⁵¹ Bell Atlantic Reply at 10. These bizarre interpretations of the scope of "White Pages" directories are yet another example of how the Regional Companies, or some of them, would abuse any flexibility that might be afforded to them.

⁵² By the same token, the Court hereby denies requests by competitors of the Regional Companies for a reexamination of its decision to allow Regional Companies to provide "White Pages" electronic directories. *See, e.g., Digital Directory Assistance, Inc., Memorandum at 3.*

"White Pages" exception, nor is searching by any of those categories.

A reading of the draft orders and explanatory memoranda submitted on this particular issue indicates that some parties may have confused the Court's ruling in regard to the "White" and "Yellow Pages" directories with that on introductory information content as a gateway component. For example, U S West argues that electronic White Pages services should not be artificially restricted because "[a] purely alphabetical listing would not attract users to the gateway and would not serve to familiarize users with the use of information services."⁵³ Familiarization with information services is not the purpose of White Pages; that purpose is effected by gateway introductory information. The two types of services are completely unrelated in function and design: to be listed in electronic "White Pages" directories an individual or a business needs no more than a telephone number; by contrast, gateway introductory information serves as a guide only to those individuals and businesses who are information services providers accessible through the gateway.

The Court has endorsed the provision of welcoming pages and provider listings in the gateway context. Opinion, 673 F.Supp. at 594-95. In the Regional Companies' role as the providers of gateways to information services, they may list names, addresses, service and business categories, and other information which would assist the user in identifying a service provider, as long as such information is not offered in a way so as to discriminate among providers. The gateway should allow the customer without much difficulty to search the data base in any of these categories. This service does not, however, extend beyond the group of entities that provides services through the gateway; those who merely have a telephone and a telephone number are not in that category.

⁵³ U S West Reply at 7.

To the extent that use of the gateway can be made user friendly, the Regional Companies should be encouraged to assist novice and veteran users alike. Therefore, in addition to those items previously identified as appropriate introductory information content, the Regional Companies may provide a "help" capability and directions for navigating within their gateway. Information as to how to locate different providers, how to use the listing of providers, how to select an information service, how to exit the network, and the like would be appropriate subjects of a gateway "help" function.⁵⁴ Once again, however, this capability will be limited to information about using the gateway—it will not extend to information about an individual service provider's own system.⁵⁵ The information service provider may of course make such assistance to navigation available to its subscribers as part of its menu, but that would be a function under its control, not that of the Regional Company.

C. *Kiosk and Revenue Sharing*

The Court has previously indicated that any type of consolidated billing system will be permitted as long as it does not provide for the sharing of revenue. Opinion, 673 F.Supp. at 594. Because the "kiosk" billing system used by the French Teletel, in which the telephone company bills the consumer on a flat-rate-per-service basis, appeared to be a form of revenue sharing, the Court indicated that it would preclude the Regional Companies from adopting a similar system. Opinion, 673 F.Supp. at 594 n. 310. Subsequent to that determination, the Court has analyzed further the kiosk billing arrangement, and it

⁵⁴ See National Consumers League, et al., Memorandum at 7-8.

⁵⁵ As the Court has previously noted, service menus of the information providers are a matter of editorial control, closely inter-related with information content. Opinion, 673 F.Supp. at 595. Menu service may not be provided as part of gateway introductory information.

has now become persuaded that it should rescind that categoric preclusion.

The French kiosk system appears to have been a key factor in the growth and expansion of Teletel by simplifying consumer access to and use of the network. Users pay for Teletel calls on their regular telephone bills, and the French telephone company in turn transfers a pre-arranged portion of the collected sums to remunerate the individual information service providers. These payments are based on traffic statistics: the more popular a service, the greater the service provider's income.⁵⁶

Because a simple, constant price is charged for a wide variety of services, consumers are encouraged to browse in the system. This facilitates their familiarity with the various information providers and increases the competitiveness of services offered. The French telephone company's only interest, as it relates to billing, is in collecting a flat fee for each time increment that the system is accessed by a particular consumer.⁵⁷ It is apparently largely because of the practical simplicity of the kiosk system that Teletel has become widely used in France.⁵⁸

Technically speaking, this type of billing arrangement involves a measure of revenue sharing; as service providers' revenue increases, the telephone company's income

⁵⁶ "Keys of success," *Teletel Newsletter*, Special Issues No. 2, 1987, at 5.

⁵⁷ As the Teletel network has become more sophisticated, the French telephone company has refined the kiosk system. Initially, a single charging rate was in effect for all services. To boost growth in kiosk services for businesses and professional users, which may cost more to develop but often receive fewer calls than services aimed at the general public, Teletel introduced multirate kiosk charging in the summer of 1987. Accessing services in the higher billing category is thus more expensive for users, but in return, the service providers receive a larger payment for each call.

⁵⁸ "Keys of Success," *Teletel Newsletter*, Special Issue No. 2, 1987, at 5.

from the network rises. However, this cooperative arrangement benefits everyone—service provider, gateway provider, and consumer alike—by lowering administrative costs and establishing a uniform billing mechanism which can easily be understood by the novice user.

There is little, if any, offsetting potential for discriminatory behavior, since the network has no incentive to prefer one provider over another. In fact, the kiosk system is in many ways comparable to billing arrangements currently used by the Regional Companies for “976” services. In that market, telephone company charges are based on a percentage of the information provider’s revenue.⁵⁹ The Court has not been apprised of any negative effects this arrangement has had on competition in the industry; and the French kiosk billing system, or any other billing mechanism which charges on a flat rate, per call, or per minute basis, would seem to fall in that same category.⁶⁰ Therefore, the Court will withdraw its prior conclusion that kiosk-type billing arrangements would necessarily involve harmful revenue sharing agreements, and it will allow the Regional Companies to bill on any basis, provided, of course, that the billing method is not discriminatory in any way.

D. *Protocol Conversion*

Businesses and consumers in this country are already using a broad and disparate array of computer terminals with a wide variety of operating characteristics. An effective gateway, to be fully useful, should be able to communicate readily with all these terminals, and it would therefore be advantageous if it were more sophisticated than the French model (which needs to communicate only with dumb terminals).

⁵⁹ Department of Justice Memorandum at 18-19.

⁶⁰ See, e.g., Department of Justice Response at 13; Ameritech Response at 13-14.

The Court has previously ratified the use of one particular type of protocol conversion, asynchronous-to-X.25 packet signals. However, it does not follow from the fact that this is the Teletel protocol conversion mechanism, as well as the most prevalently used conversion mode today, that the Regional Companies should be restricted to this technology. Other types of protocol conversion are in effect even now, each with a particular application. For example, a gateway which provides electronic mail would have to be able to convert individual users' protocols to X.400 protocols, the international standard for electronic mail;⁶¹ similarly, synchronous,⁶² rather than asynchronous protocols, are widely used by hospitals and state governments in data communication.⁶³

The Court has concluded that the correct approach to this question is one which allows flexibility for change and choice, and which encourages innovation. To the extent that protocol conversion methods exist or are developed other than asynchronous-to-X.25 which do not involve the manipulation of content, their use is permitted without further specific sanction from the Court.⁶⁴

⁶¹ Bell Atlantic Memorandum at 15 n. 18.

⁶² Synchronous data transmission differs from asynchronous data transmission in that the transmitting and receiving devices can have character synchronization for a significant period of time. During the time that the devices are synchronized, it is possible to transfer data without marking the extremes of each character. This makes it possible to omit stop and start bits and increase transmission efficiency and speed. J. Hammond & P. O'Reilly, *Performance Analysis of Local Computer Networks* at 38 (1986).

⁶³ Ameritech Reply at 4.

⁶⁴ However, it appears that the Regional Companies have requested the FCC only for authority to perform async./X.25 and async./X.75 protocol conversion services. Tynmet-McDonnell Douglas Memorandum at 11. If the FCC adopts that standard, the Regional Companies will of course not be free to exceed the limits set by that body.

E. *Procedural Requirements*

Many commenters argue that transmission of information services should be allowed only in tandem with tailored provisions of a procedural nature.⁶⁵ While the interests to be protected by such provisions are important, it is also true that the imposition of many new procedural requirements, willy-nilly, would seriously impair the development of a healthy and vigorous information services market. The Court is particularly reluctant to duplicate on the judicial level a vast and complex scheme of procedures where regulation exists on the federal and state regulatory commission levels having similar purposes.⁶⁶ This is not to say, however, that the objectives of the commenters, to the extent that they are substantial, cannot and should not be attained, either through the requested requirements or by alternative means.

Two issues predominate: discrimination and cross-subsidization.

⁶⁵ Among the safeguards advocated are provisions requiring non-discriminatory disclosure of network interface changes, *see* Hayes Microcomputer Products, Inc., Reply at 12-14, provisions against cross-subsidization, *see* Consumer Federation of America Memorandum at 4-6; Computer and Business Manufacturer's Association Response at 11-12, equal access, *see* Information Industry Association Memorandum at 13-17; ADAPSO Memorandum at 3-4, non-discrimination safeguards, *see* Electronic Yellow Pages and Information Association Memorandum at 3, 11-13; TRINITEX Reply at 6-8, requirements regarding colocation, *see* Dun & Bradstreet Memorandum at 12, and operation through separate subsidiaries, *see*, U S Sprint Memorandum at 18.

⁶⁶ The Court sees no reason, at this stage of the AT & T case, to endorse a return to the detailed and complicated framework considered and rejected by the parties as a possible means of settlement in that suit. As might be inferred from the names by which those negotiations have become known, Quagmire I & II, the entire subject became a hopeless web of intricate, issue-by-issue micromanagement that was destined for failure. *See*, generally, S. Coll, *The Deal of the Century: The Breakup of AT & T*, at 252-56; 297-301.

The decree in its present form already sets out in general and broad terms restrictions against discriminatory behavior. Thus, section II(B) provides that “[n]o [Regional Company] shall discriminate between AT & T and its affiliates and their products and services and other persons and their products and services in the . . . interconnection and use of the [Regional Company’s] telecommunications service and facilities or in the charges for each element of service.” See also § II(A). These restrictions will continue to govern the Regional Companies in their provision of information gateway services,⁶⁷ and the Court sees no reason to add yet another requirement of this nature to the safeguards already in place.

Moreover, the Federal Communications Commission is apparently establishing mechanisms to address both the discrimination issue and the issue of cross-subsidization. For example, in the Async/X.25 Proceedings and the Third Computer Inquiry, the FCC has established a number of competitive safeguards to govern the provision of enhanced information services—including protocol conversion—by the Regional Companies.⁶⁸ The efficacy of these safeguards is of course still uncertain. See Opinion, 673 F.Supp. at 576. The Court retains jurisdiction

⁶⁷ In the Order appended hereto, the decree will be amended to except from the prohibition of section II(D)(1) Regional Company provision of certain “transmission” functions as they relate to information services. Concurrently, the amendment makes clear that the Regional Companies’ non-discrimination obligations are to continue in the face of that relaxation.

⁶⁸ Async/X.25 Order, 100 F.C.C.2d at 1104-12; *Computer III Phase II Order*, 2 FCCRcd. at 3078-82. The fundamental precepts underlying the safeguards adopted by the FCC are that: (1) transparent transmission services should continue to be available to the public; (2) the Regional Companies should not be allowed to discriminate against competing information service vendors or their customers; and (3) the Regional Companies’ monopoly ratepayers should not bear the costs of these competitive services.

over this question, however, and if it appears that the Regional Companies are abusing the authority granted herein, and that FCC regulatory control is insufficient to curb violations, the Court will take the requisite enforcement action.

Today's ruling will allow the Regional Companies to strike out into new and uncharted waters. In an effort to grant sufficient flexibility to build a workable network, the Court has resisted tying the companies' entry into the field to a host of strict new procedural requirements. That approach may increase the potential for unfair practices; certainly it places initial responsibility for complying with the decree in the hands of the Regional Companies themselves.

In the exercise of the Court's continuing jurisdiction over the decree, however, as well as pursuant to the Department of Justice enforcement authority, Regional Company behavior in the information services field will be closely monitored. Should it become apparent that the flexibility granted herein is being abused, that local bottlenecks are being used to discriminate against competitors in the information services market, or that the information services are being subsidized by funds contributed by the ratepayers, the Court will take appropriate enforcement action. In fact, if the behavior of a particular Regional Company proves particularly egregious, the Court will not hesitate to rescind that violator's authority to engage in information transmission services altogether.⁶⁰

⁶⁰ The announcement of the possible use of this sanction, while severe, is intended to place the Regional Companies on notice that the Court expects their complete fidelity to the decree in entering this new market.

VII

Voice Storage and Retrieval

Although not discussed in substance in the September 10, 1987 Opinion, Regional Company participation in the voice storage and retrieval market generated substantial debate in the most recent round of comments.⁷⁰

The positions taken on this issue, as on many others, are in diametric opposition to each other. A number of parties, including both the Regional Companies and others⁷¹ see no barrier to entry into this market, arguing that no manipulation of content is involved in the service.⁷² Other parties and intervenors postulate that, due to the Regional Company monopoly of the local switching services, a competitive market for the delivery of these services to consumers is likely to develop only if the Regional Companies remain prohibited⁷³ from providing them.⁷⁴ Yet other parties support Regional Company pro-

⁷⁰ Since the Court did not discuss this topic in its September 10, 1987 Opinion, somewhat greater elaboration is necessary here than with respect to the "transmission" discussion, *supra*.

⁷¹ *E.g.*, National Consumers League Memorandum at 14-15; Voice Message Desk Systems, Inc., Memorandum at 2-6; MessagePhone, Inc., Memorandum at 3-11; Florida Public Service Commission Memorandum at 11-12; Michigan Public Service Commission Memorandum at 4.

⁷² *E.g.*, NYNEX Memorandum at 8-9; Ameritech Memorandum at 7-10; BellSouth Reply at 8.

⁷³ The decree prohibits the Regional Companies, *inter alia*, from "storing" and "retrieving" information. Sections II(D)(1), IV(J). Of course, like all restrictions, they are subject to removal pursuant to section VIII(C).

⁷⁴ Enhanced Service Providers Memorandum at 4-5; MCI Memorandum at 2; Compuserve Memorandum at 8; Consumer Federation of America Memorandum at 3. It is also argued that the Regional Companies would possess "substantial potential" to subsidize these services illegally and to discriminate in providing competitors access to essential facilities. CompuServe Memorandum at 9-10; Committee of Corporate Telecommunications Users Response at 8.

vision of certain storage and messaging capabilities, but only if limitations are clearly defined by the Court.⁷⁵

There are three quite distinct settings in which storage capabilities of the Regional Companies could be used in the information services market.

First, and most basic, is very short term storage. This transient storage and retrieval of information is an integral part of the transmission of communications and is currently being performed within the network in a variety of ways. Data is routinely stored each time a telephone call is made; the network stores the digits dialed by the calling party until a sufficient number of digits are input to allow direction of the call to its destination.⁷⁶ In the context of speed calling and call forwarding, storage of user-identified numbers occurs over time, not merely during the course of the transmission of a telephone call. Even the basic packet switching function, performed on an intra-LATA basis by Regional Companies, involves the breakdown of data or voice communications into small bits of information that are then collected and transmitted between nodes. These bits of data are subject to constant storage, error checking, and retransmission, as required for accurate transmission.

The information services gateway as contemplated by the September 10, 1987 Opinion will also necessarily require some storage capability to house the welcoming message, the Information Service Provider (ISP) di-

⁷⁵ *E.g.*, Information Industry Association Response at 4-11; Committee of Corporate Telecommunications Users Response at 7-9. One draft order, submitted jointly by U S West and the ANPA, proposes that the Regional Companies be permitted to provide storage on a wholesale basis to information providers, but prohibited from such provision on a retail basis to end users. U S West Memorandum at 14-16; ANPA Memorandum at 15. The Court rejects this distinction as being too difficult to administer in practice without the endless submission of requests for construction.

⁷⁶ Southwestern Bell Memorandum at 9.

rectory, and information for the provision of billing services. At least at this elementary level, the Regional Companies must plainly be and will be permitted to engage in storage and retrieval functions.⁷⁷

Second, the Regional Companies might provide storage space in their gateways for databases created by others and lease that space to information service providers and end users. Making storage facilities available at the gateway level will make communication more efficient by moving information closer to the end user, thereby reducing transmission costs.⁷⁸ It is also possible that gateway storage would reduce entry costs to the information providers by obviating the need for their purchase of their own storage hardware.⁷⁹

This use of storage capabilities, while not technically necessary to an information infrastructure, would substantially assist in attracting to the system providers of information services, and it consequently would help to ensure that a "critical mass" of services would be available through the network. There is no significant potential for discriminatory behavior in this market, and this use of storage capabilities will also be permitted.

⁷⁷ There is little dispute as to the desirability of allowing the Regional Companies to engage in storage to this limited extent. *See, e.g.*, Consumer Federation of America Reply at 5, "The only storage and messaging functions in which the Regional Companies should engage are those internal network functions which are fundamental to prompt, high-quality interconnection between ISPs and end-users."

⁷⁸ Ameritech Memorandum at 8, Bell Atlantic Memorandum at 8.

⁷⁹ *See* Ameritech Memorandum at 9; Bell Atlantic Memorandum at 8. It may be true that some information providers would choose to obtain storage capabilities from the Regional Companies should that service be available through the gateway. However, this service, like many others relating to computer technology, is also available through independent providers, and it is therefore neither necessary that the gateway furnish this facility, nor will the gateway necessarily provide the most cost efficient storage.

The third, and most encompassing use of storage capabilities would be in the provision of services such as voice messaging,⁸⁰ voice storage and retrieval (VSR),⁸¹ and electronic mail.⁸² Provision of these services would not involve the Regional Company in the generation or manipulation of information content⁸³ for provision to the public.⁸⁴

⁸⁰ The term "voice messaging" encompasses a wide assortment of caller-directed, transient storage, limited-duration exchange telecommunications services.

The technology allows a caller, in response to a busy signal or no answer, to record a brief message and then provide the calling instrument, the originating PBX, or the local exchange central office with routing instructions and a limited duration during which the system will attempt to complete the call and let the called party accept the recorded message at his discretion. In the event of an interexchange call, the originating caller rather than the local carrier selects the interexchange carrier. Because the caller must identify himself, the called party can accept the message or merely hang up; by agreeing to receive the message the called party becomes liable for the cost of the service. MessagePhone Memorandum at 3-4.

Voice messaging is thus a purely unidirectional transmission. It is strictly caller-directed and can be initiated with as little as a single digit or character code. There is little to differentiate voice messaging from a standard telephone call other than by the incorporation of a short time delay for message delivery.

⁸¹ Voice storage and retrieval systems, in generic terms, act as sophisticated versions of an answering machine. Typically, incoming calls are intercepted by equipment which acquires analog speech, converts it to digital forms, and stores the digital version until it is required for retrieval in analog form. Huber Report at 10.1.

⁸² VSR and electronic mail services are much alike, except in the form of the information content: in VSR, the information is stored as a voice message, in electronic mail services, it is stored as a printed message.

⁸³ In the simplest sense, such use of storage capability allows for time-delay services, that is, messages from an information provider or a user are stored until the particular telephone line is available or the called person or machine becomes free.

⁸⁴ The fact that content might be converted to digital form for storage, and then returned to analog form for retrieval and trans-

Although there is some dispute on this issue, the Court is persuaded that voice information services are likely to become much more affordable and much more widely used in this country⁸⁵ if the Regional Companies were permitted to provide storage to accommodate messages and other information until the intended recipient was ready to receive the transmission.⁸⁶

Objections to a wholesale Regional Company entry into markets requiring storage capabilities fall generally into two categories: first, that these are not functions "necessary" to a gateway, and for that reason were not contemplated by the September 10, 1987 Opinion; and second, that there has been no showing under section VIII (C) of the decree as to lack of competitive harm.

To the extent that objections to Regional Company entry into this market depend on a finding that storage is not a function "necessary" to the provision of transmission services, the argument succeeds in part and fails in part. As indicated *supra*, some amount of storage is necessary to any transmission activity over the local exchange network, be it in the context of information services or in routine telephone communication. These types of storage functions are therefore "necessary" to

mission to the called party does not place it within the realm of content manipulation. For practical purposes, the stored information reaches the intended recipient in the same content form as it was in when it was delivered.

⁸⁵ The experience of foreign telephone companies shows that these services are in important gateway function. Although the French Teletel system does not provide electronic mail now, it is installing that capability. In Japan, Canada, West Germany, Ireland, Denmark, Belgium, and Holland, the telephone companies all provide this service. Bell Atlantic Memorandum at 11. Voice messaging has become so popular in Japan that consumers send 60,000 voice messages, each day. See *Communications Week*, September 28, 1987, at 56; *How Tokyo Is Turning Telephones Into Answering Machines*, *Business Week*, February 16, 1987 at 104C.

⁸⁶ See, e.g., OCTEL Memorandum at 12.

the gateway infrastructure in the narrowest sense of the word. It is, however, debatable whether the broader and more sophisticated storage functions briefly described above are necessary to transmission. Although the Regional Companies could transmit information without having the ability to perform these functions, the functions are certainly helpful to transmission.⁸⁷

In any event, however, whether or not the provision of such services is necessary to the performance of the functions of a transmission gateway, the Court may remove the restrictions if it concludes that the section VIII(C) test has been met. In this regard, the opponents of Regional Company entry into the voice storage and retrieval markets contend that such entry would result in the displacement of independent firms.⁸⁸

It may safely be assumed that a large potential market exists for voice storage and retrieval services, far beyond the relatively meager market that is serviced by the existing providers. Entry of the Regional Companies into this market would be bound to enlarge it manifold, and new economic opportunities would be created for many

⁸⁷ In one sense, call answering, voice mail, and electronic mail offerings are independent services for which competitive markets currently exist. See, e.g., MCI Memorandum at 3. In this view, the question simply is whether Regional Company entry into these markets would have positive or negative competitive effects.

⁸⁸ It is of course a fundamental principle of jurisprudence that the antitrust laws protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962). These laws seek to foster competition by increasing the number of providers in the marketplace and thereby allowing the consumer, through demand for services, to select the winning firm. It is likewise the purpose of the decree to allow consumers to reap the benefits of competition in telecommunications. The Regional Companies should not be excluded from this market simply because, due to their size and interest in the communications field, they would likely be formidable competitors therein. To decide otherwise would be in effect to grant exclusive franchises to the current providers. See also note 48, *supra*.

new providers as well as for those who now supply the market. What has until now been a relatively quiescent market is likely to become a broad, vigorous, and competitive one. On the other hand, it may well be that the Regional Companies, not satisfied with the market share they are likely to acquire, would attempt also to drive out, or reduce the opportunities for, those who independently service that market, either as voice storage providers or as manufacturers or sellers of answering machines.

The issue as to the potential for anticompetitive activity is thus a close one; valid arguments can be made to support either outcome, and the Court is not convinced that a showing has been made to militate in either direction.

In the Court's opinion, several factors tip the balance in favor of Regional Company entry.

First. In view of the fact that the core violations that were the subject of proof during the AT & T trial did not involve this market at all, there is less reason to believe that Regional Company involvement in this industry will lead to anticompetitive behavior than would, for example, its involvement in long distance, provision of information content, or manufacture of telecommunications products.

Second. Due to the subtle competitive pressure exerted on this market by the presence of service bureaus, answering services, and particularly home answering machines, the ability to control prices and otherwise to operate monopolistically will be substantially diluted.

Answering machines are used by about ten percent of American households.⁸⁹ The consumer's choice between answering machines and Regional Company sponsored voice storage and retrieval will most likely be cost-sensi-

⁸⁹ Voice Message Desk Systems, Inc., Memorandum at 5.

tive—should the price of automated services greatly exceed the amortized cost of an answering machine, few individuals are apt to subscribe. This economic impetus will, to a large extent, remove the ability of Regional Companies to raise prices unreasonably.

Third. In view of the largely inconclusive and speculative nature of the competitive considerations, other public policy factors should also be considered.⁹⁰ In this context, the public interest heavily tips the balance in favor of the requests of the Regional Companies.

The likelihood is that truly ubiquitous access to these services will not be had by the residential and small business consumer in the absence of Regional Company involvement.⁹¹ Despite the emergence of several independ-

⁹⁰ As indicated above (p. 5 n. 11), *supra*, this is not the first time that the Court has weighed matters of public import in ruling on questions of interpretation under the decree. The earliest such consideration occurred when the decree itself was modified and approved six years ago, in part because of public policy considerations which extended beyond the category of antitrust violations. At that time, the Court noted that the interests of universal service, for example, strongly supported entry of the decree, as well as the adoption of changes that allowed the Regional Companies to market customer premises equipment and Yellow Pages directories. The most recent such consideration occurred only last month, when the Court approved waivers of the terms of the decree, the public interest in receiving a particular service being at issue. *See, e.g., United States v. Western Electric Co.*, C.A. No. 82-0192, slip op., 1988 WL 72635 (D.D.C. Feb. 8, 1988) (time and weather information).

⁹¹ *See, e.g.*, National Consumers League Memorandum at 14-15; MessagePhone Memorandum at 5; Voice Message Desk Systems, Inc., Memorandum at 3-6. This conclusion is disputed by AMVOX, a recently formed provider of telephone answering and voice messaging, which claims to have targeted the small business and residential customer as its prime service audience. AMVOX Memoranda at 4. This news is encouraging, and it is to be hoped that this trend will continue. However, the fact that this independent company has entered the market and seeks to reach all small business and residential customers is of course not a guarantee that this objective will be met.

ent providers, the market for voice storage services, particularly for the occasional user, has not developed in this country to anywhere near its potential. As a practical matter, small and medium-sized businesses as well as consumers have to date had very limited opportunity to enjoy the benefits of these services, for reasons very much like those that explain the limited development of videotex itself in the United States. *See* Opinion, 673 F.Supp. at 590-91.

In-house voice information systems require large up-front investments that are cost-effective only when spread over a large number of users, and only large businesses are therefore willing to make this capital investment. Further, high start-up and operating costs have limited the emergence of individual service providers, and where such providers do exist, economic factors have generally required them to deploy large, centralized facilities that, in order to serve broad areas, depend upon expensive long-haul transmission capabilities. To minimize their transmission costs, existing providers of voice information services have, once again, focused their business on service to larger business users, especially those located near the provider's own facility.⁹² More generally, consumer and small business awareness has been low, and the need for presubscription has kept potential users from joining the system.

Given these conditions and limitations, it is appropriate for the Court to take into account values in addition to those stemming exclusively from an environment free of anticompetitive activity. In this case, such values revolve largely around the interest of providers and potential consumers to attain the widest possible availability of voice storage and retrieval services to all segments of American society. As indicated, this objective can most readily be achieved by allowing Regional Com-

⁹² OCTEL Memorandum at 3-4.

pany participation in the market for voice storage and retrieval type services. On this basis, and since the risk of anticompetitive activity is small, the Court will allow such participation. The Regional Companies will accordingly be authorized to enter the markets for voice storage and retrieval, voice messaging, and electronic mail.⁹³

VIII

Order

For the reasons and on the bases described above, it is this 7th day of March, 1988

ORDERED that the decree entered herein on August 24, 1982, be and it is hereby amended by the addition of the following new subsection of section VIII:

K. Notwithstanding the provisions of section IV(J):

1. The separated BOCs shall be permitted to engage in the transmission of information as part of a gateway to an information service, but not in the generation or manipulation of the content of information. "Transmission" shall mean the performance of the following functions: data transmission, address translation, protocol conversion, billing management, and introductory information content.
2. The separated BOCs shall be permitted to engage in voice storage and retrieval services, including voice messaging and electronic mail services.
3. In the performance of the services authorized herein, no BOC shall discriminate between and among providers of information or against other providers of information services or of voice storage and retrieval services.

⁹³ This ruling in no way exempts the Regional Companies from complying with the more general ban against engaging in information services activities which involve the manipulation or generation of content.

APPENDIX D

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

Civ. A. No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
Defendants.

Sept. 10, 1987

Charles F. Rule, Acting Asst. Atty. Gen. Barry Grossman, Chief, Communications and Finance Section, Nancy C. Garrison, Asst. Chief, Communications and Finance Section, Edward T. Hand, Asst. Chief, Foreign Commerce Section, Ben Giliberti, Atty., Antitrust Div., U.S. Dept. of Justice, Washington, D.C., for U.S. Dept. of Justice.

John D. Zeglis, Jim G. Kilpatric, Francine J. Berry, Basking Ridge, N.J., Howard J. Trienens, David W. Carpenter, Chicago, Ill., Ben W. Heineman, Jr., Sidley & Austin, Washington, D.C., for AT & T.

Thomas P. Hester, John Thorne, Jeffrey J. Kennedy, David P. Boyd, Kirkland & Ellis, Chicago, Ill., Donald E. Scott, Alfred Winchell Whittaker, Katherine C. Zeitlin, Kirkland & Ellis, Washington, D.C., for Ameritech.

Robert A. Levetown, John M. Goodman, James R. Young, Washington, D.C., for Bell Atlantic.

Norman C. Frost, Mark D. Hallenbeck, Atlanta, Ga., Abott B. Lipsky, Jr., King & Spalding, Washington, D.C., for BellSouth.

Raymond F. Burke, Gerald E. Murray, Mary McDermott, Melvin A. Cohen, White Plains, N.Y., for NYNEX.

Robert V.R. Dalenberg, Paul H. White, Kathy A. Hackmann, Richard W. Odgers, Mary Cranston, Pillsbury, Madison & Sutro, San Francisco, Cal., Rex G. Mitchell, Reno, Nev., Stanley J. Moore, Washington, D.C. for Pacific Telesis Group.

Edgar Mayfield, James S. Golden, Mary Whitten Marks, Gregory J. Christoffel, St. Louis, Mo., Liam S. Coonan, Washington, D.C., for Southwestern Bell Corp.

David I. Shapiro, Richard C. Schramm, James vanR. Springer, Joel B. Kleinman, Dickstein, Shapiro & Morin, Washington, D.C. (Laurence W. DeMuth, Jr., Stuart S. Gunckel, David S. Sather, Alan J. Gardner, Cameron R. Graham, of counsel), for U.S. West, Inc.

Chester T. Kamin, Thomas S. Martin, Michael H. Salisbury, Anthony C. Epstein, Glenn B. Manishin, Christopher S. Vaden, Carl S. Nadler, Jenner & Block, John R. Worthington, Senior Vice President and Gen. Counsel, Washington, D.C., for MCI.

OPINION

HAROLD H. GREENE, District Judge.

Following the submission of a report from the Department of Justice, in accordance with the Court's Opinion of August 11, 1982 which approved the consent decree,¹ a

¹ *United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131, 195 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 460 U.S.

number of motions were filed which collectively sought removal of all the line of business restrictions embodied in section II(D) of the decree.² That section provides as follows:

After completion of the reorganization specified in section I, no BOC shall, directly or indirectly, or through any affiliated enterprise:

1. Provide interexchange telecommunications services or information services;
2. Manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or
3. Provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.³

1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983) (hereinafter referred to as "*AT & T*", 552 F.Supp. 131). The Department of Justice report, entitled "Report and Recommendations Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment," was accompanied by a document entitled "The Geodesic Network: 1987 Report on Competition in the Telephone Industry," prepared by Dr. Peter Huber, a Department consultant (hereinafter referred to as the "Huber Report").

² See motions of Department of Justice, NYNEX Corporation, U S West, Inc., BellSouth Corporation, Pacific Telesis Group, Ameritech, Bell Atlantic, Southwestern Bell Corporation, and Florida Public Service Commission.

³ The twenty-two BOCs, or Bell Operating Companies, were integrated into seven Regional Holding Companies pursuant to a plan of reorganization of AT & T approved by the Court. *United States v. Western Electric Co.*, 569 F.Supp. 1057 (D.D.C.1983), *aff'd sub nom.*, *California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983). This actually was a proceeding in the *AT & T* case, but it bears the *Western Electric Co.* label, as do all subse-

The Court invited interested persons and organizations to intervene in this proceeding and to file responses to the report and the motions, and the parties as well as the intervenors were given the right to file additional memoranda and replies.⁴ A total of some 170 organizations and individuals availed themselves of the opportunity to intervene. In addition to submissions from AT&T, the Department of Justice, and the seven Regional Holding Companies (hereinafter referred to as the Regional Companies),⁵ lengthy and thoughtful memoranda were also filed by competitors or potential competitors of the Regional Companies, representatives of state governments and state and public regulatory bodies, consumer organizations, labor unions, trade associations, and others.

The Court received a total of about three hundred briefs, totaling some 6,000 pages, including oppositions, responses, replies, and factual appendices, and it heard oral argument for three days from attorneys representing

quent pleadings, orders, and decisions, to accommodate the fiction that the consent decree primarily settled a 1949 lawsuit against the Bell System in the District of New Jersey, which proceeded under the *Western Electric Co.* caption, rather than the instant 1974 action. *See generally, AT & T*, 552 F.Supp. at 135-39.

The Regional Companies inherited the assets, the powers, and the decree obligations of the Operating Companies. *Western Electric Co.*, 569 F.Supp. at 1062 n. 5. The Court will generally refer herein both to the Bell Operating Companies and to the Regional Holding Companies as the Regional Companies. *See also* note 5, *infra*.

⁴ *See United States v. American Cyanamid Co.*, 719 F.2d 558, 564 n. 6 (2d Cir.1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984).

⁵ The parties and others have also referred to these firms as RHCs, Bell Companies, or Operating Companies. In conformity with the Court's policy to avoid, to the extent possible, initials and expressions not comprehensible to the uninitiated, it will refer to the firms as the Regional Companies, to the local operating firms as the Operating Companies rather than the BOCs, and to the judgment in this case as the decree rather than the MFJ.

the parties, the Regional Companies, and the major groups of intervenors. This Opinion and the accompanying Order dispose of all the current controversies involving the retention or removal of the line of business restrictions.⁶ The Opinion is organized as follows.

There are two introductory sections—Part I. Background; and Part II, Standard for Removal of the Restrictions. The following three sections address specifically the core restrictions—Part III, Interexchange Services; Part IV, Manufacturing; and Part V, Information Services. The next two sections provide additional information on the removal issue—Part VI, Regulation; and Part VII, Current Anticompetitive Activities and Public Policies. Two sections deal with what may be regarded as non-core restrictions—Part VIII, Information Transmission; and Part IX, Non-Telecommunications Services. The last section, Part X, is the Conclusion.

I

Background

The present controversy had its genesis shortly after World War II. At that time the government became concerned about apparent violations of the antitrust laws by the Bell System,⁷ and in January 1949, an action was brought against that System by the Department of Justice which sought, among other things, the separation of

⁶ On December 9, 1986, AT & T filed a motion requesting that the responsibility for screening requests for individual waivers of the line of business restrictions prior to Court action thereon be transferred from the Department of Justice to the Federal Communications Commission. That motion has since been withdrawn, and it will therefore not be decided or discussed herein.

⁷ Prior to the 1984 divestiture, the terms "Bell System" and "AT & T" were in the main used interchangeably. To avoid confusion with the present truncated AT & T, the Court will herein generally refer to the predivestiture company as the Bell System.

telephone manufacturing from the provision of telephone service. The lawsuit was settled seven years later under circumstances which, in the opinion of the Antitrust Subcommittee of the House Committee on the Judiciary, indicated the presence of political and other corrupt influences. *See* Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess., January 30, 1959 (Committee Print).⁸

Not long thereafter another agency of the United States entered into the picture. The monopoly of the Bell System in the provision of telephone service,⁹ which theretofore had been regarded as a given fact, had come to be questioned in the wake of the discovery that microwaves could be substituted for copper wires for the transmission of long distance telephone conversations.¹⁰ At the same time,

⁸ For a description of some of the circumstances surrounding the Department's about face that led to the 1956 settlement, *see AT & T*, 552 F.Supp. at 135-38. The Department of Justice's change of position resulting in that settlement was partially responsible for the enactment of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (Tunney Act), which requires court approval of settlements reached in government-initiated antitrust cases. The Congress concluded that the political and economic influences and pressures on the Department of Justice in antitrust cases often are such that the safeguard of a "public interest" finding by a court is necessary as a prerequisite to the entry of any consent decree in such cases.

⁹ Some of the areas of the country, particularly in the more sparsely populated regions, were served by independent telephone companies. But where the Bell System operated, and that included the major cities and other densely populated areas, it had a monopoly.

¹⁰ These wires had been the basis of the Bell System's correct claim that there was no practical alternative to the provision of telephone service by a single entity. It obviously would have been, and it still is, impractical to expend the enormous capital required for the construction of a second or third set of wires connecting all the households and offices of this nation. However, microwaves and subsequently satellites have proved both practical and economically efficient for long distance transmissions.

the practice of the Bell System's local Operating Companies to satisfy their huge switching and other equipment needs exclusively from AT & T's affiliate Western Electric, rather than to make use also of outside suppliers, began to be challenged by small, efficient manufacturers with special expertise and special products to sell.

Initially the Bell System brushed off these attempts at competition as bothersome obstacles to its endeavor to provide integrated and efficient telephone service to the American people, but eventually the complaints of the would-be competitors came to be heard by the Federal Communications Commission, beginning with *Carterfone*, in 1968.¹¹ Thereafter, the FCC struggled with one complaint against the Bell System after another. Although after drawn-out proceedings the Commission was able at times to achieve some small successes,¹² it eventually became apparent to everyone, including those in charge of regulation at the Commission, that the FCC, with its relatively small staff and other resources, and its limited authority, would never be able to cope successfully with the Bell System's powerful monopoly position and its ever-changing strategies. *See also* Part VI, *infra*.

The FCC's efforts to regulate the Bell System constituted a major part of the evidence adduced during the eleven-month trial of this case, and many witnesses and a large number of documents pointed to the FCC's lack of

¹¹ 13 F.C.C.2d 420 (1968). It is generally agreed that *Carterfone* was foreshadowed by *Hush-a-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956).

¹² *See, e.g., Specialized Common Carriers*, 29 F.C.C.2d 870 (1971). The most significant advance—the decisions to require connection for the competing Execunet service—was brought about by the Court of Appeals for this Circuit rather than the FCC. *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590, 597 (D.C.Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 566, 58 L.Ed.2d 651 (1978); *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C.Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 780, 54 L.Ed.2d 790 (1978).

success in that regard. Testimony was heard and documents were introduced demonstrating the inability of the regulators to penetrate and evaluate the Bell System's accounting system and its cost and pricing strategies; to determine the utility or lack of utility of devices the Bell System required as a prerequisite to the attachment of competitors' wires to the national telephone network; to assess the legitimacy of the reasons given by the Bell System for making important information available to Bell operational components in advance of its distribution to others; and to reach conclusions concerning other methods employed to disadvantage Bell's competitors.

Among the Department of Justice's expert witnesses who placed some of these problems in perspective were Professor William Melody who testified with respect to cross-subsidization between the Bell System's regulated and its unregulated activities that "[o]ver the last fifteen years, the Federal Communications Commission has both recognized and attempted to come to grips with this problem . . . but its experience has not been a satisfactory one and it has not been able to establish standards and implement them" (Tr. 9347-48). Professor Melody further stated, in response to questions by counsel for the Department of Justice as to whether regulation could be made effective so as to prevent the anticompetitive practices he had described, that it was "very clear on the basis of . . . the entire history of the FCC's attempt to deal with the problem, that there is no way to come to grips with the problem operationally, that AT & T's monopoly power, which extends far beyond the scope of the FCC in terms of its regulation, creates a situation where there is just simply no hope that this could ever be effectively done [by regulation]" (Tr. 9512-13).¹³

¹³ According to the witness, the FCC "has undertaken a massive investigation . . . and it has attempted to establish and implement standards that would enable it to judge and to regulate on this basis [but] after about twenty years of trying the FCC has now

Similarly, Dr. Nina Cornell, another government witness, testified that she had analyzed the effectiveness of regulation for achieving effective competition in the telecommunications industry from an economic perspective, and she had concluded that "I don't think regulation can achieve effective competition in the industry" (Tr. 10841). In her opinion, regulation is particularly weak in an area such as telecommunications where the pace of technological change is very fast (Tr. 10853-59).¹⁴

Significantly, even the two officials who, as heads of the FCC's Common Carrier Bureau for the fifteen years between 1963 and 1978, had been in charge of the regulation of the Bell System during that period, agreed with these assessments. Thus, Walter Hinchman, who was chief of the Common Carrier Bureau from 1974 to 1978, said that "I didn't feel that . . . we were at all effective in . . . controlling competitive practices or creating an environment for really full and fair competition" (Tr. 10469-70), and that, for a variety of reasons, there was a special regulatory void with respect to the Operating Companies (Tr. 10475).¹⁵ Bernard Strassburg, chief of the Bureau from 1963 to 1973, concurred, testifying that the Commission had a limited budget; that it had to rely to a large extent upon the Bell System to supply it with

for all intents and purposes, in my judgment, given up on the task" (Tr. 9353). Professor Melody explained in some detail why the relatively small FCC staff was unable to penetrate to the end and in the necessary depth the voluminous and complex Bell System studies, supporting programs, computer programs, and raw data.

¹⁴ Other witnesses, and voluminous documentary material, supported these conclusions.

¹⁵ In the witness' opinion, telecommunications regulation is inherently ineffective because "many different services, or . . . variations on a type of service . . . can be satisfied by the same facilities which . . . leads to a very high degree of what are termed common costs of operation, and one of the major problems in regulation is determining how to properly distribute and attribute those common costs to various services" (Tr. 10489).

technical information; and that its expertise to go behind the Bell System's representations was also extremely limited (Tr. 17312).

Based upon this and other evidence, the Court concluded following the close of the Department's case, and in accordance with the arguments presented by the Department,¹⁶ that "the Commission is not and never has been capable of effective enforcement of the laws governing AT & T's behavior," and that accordingly AT & T had been able to violate the antitrust laws in a number of ways over a long period of time with respect to interexchange services¹⁷ and the procurement of equipment. *AT & T*, 552 F.Supp. at 168, 170, and nn. 154, 155; *United States v. Am. Tel. & Tel. Co.*, 524 F.Supp. 1336, 1348-57, 1364-7575 (D.D.C.1981).¹⁸

It was in the context of the inadequacy of regulation to curb anticompetitive practices that Attorney General William Saxbe authorized, and the Department of Justice filed, the instant antitrust action against the Bell System on November 20, 1974. In the wake of a four-year period of relative inactivity due in substantial part to stays on discovery issued pending the resolution of jurisdictional questions, discovery and other pretrial activity were carried on on an intensive basis beginning in 1979, *United States v. Am. Tel. & Tel. Co.*, 461 F.Supp. 1314, 1337-49 (D.D.C.1978), and the case went to trial on Jan-

¹⁶ Department of Justice Memorandum dated August 16, 1981, at 46-47, 125 n. *, 161-62, 281-82, 285, and 374.

¹⁷ For technical reasons, what is popularly known as long distance service is referred to in the decree and will be referred to herein as interexchange service. Interexchange service does not include long distance calling that takes place within a LATA. For an explanation of that term, see pp. 540-41, *infra*.

¹⁸ The Court noted that the burden was accordingly on the Bell System to refute the factual showings made in the government's case-in-chief. *AT & T*, 524 F.Supp. at 1381.

uary 15, 1981. After eleven months of trial,¹⁹ at a time when that trial was within approximately three weeks from completion, the parties submitted to the Court for its approval²⁰ under the Tunney Act (*see* note 8, *supra*) a proposed consent decree.

Following extensive proceedings under that Act, with the active participation of intervenors similar in number and interests to those who are participating in the current proceeding, the Court approved the decree, provided some modifications were made. *AT & T*, 552 F.Supp. 131. One of these modifications, that was accepted by the parties and hence incorporated in the decree, was what is now section VIII(C) of the decree²¹—a provision that is central to the current proceeding.

II

Standard for Removal of the Restrictions

A. *Language of Section VIII(C)*

Section VIII(C) of the decree provides that

The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

This provision established the standard to be applied in proceedings such as this for removal of the line of business restrictions imposed by the decree on the Regional Companies.²²

¹⁹ Approximately 350 witnesses testified, and tens of thousands of documents were admitted into evidence. The trial record contains over 24,000 transcript pages.

²⁰ *See* 15 U.S.C. § 16(e).

²¹ *See AT & T*, 552 F.Supp. at 195.

²² While the Court recognized that the usual test applied in proceedings to modify a consent decree is whether changed conditions

These line of business restrictions, embodied in section II(D) of the decree, were the necessary counterpart to the divestiture itself. That divestiture removed from AT & T its local Operating Companies, the monopoly bottlenecks which had been the means used by the Bell System as a whole to discriminate against its competitors in the other markets in which it was operating (long distance, manufacturing of telecommunications equipment, information services). In turn, the inheritors of the local monopolies—the Regional Companies—were prohibited from entering the competitive markets which had been, and could be expected to be again, the beneficiaries of anticompetitive activities by those in control of those monopolies.²³

In its Opinion explaining the decree,²⁴ the Court stated that proceedings addressing the continuing viability of the line of business restrictions

existed that were “unforeseen” at the time of entry of the decree and that rendered the modification appropriate, *see AT & T*, 552 F.Supp. at 195 n.266 (relying on *United States v. Swift*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932)), it noted that the parties in this case had agreed that a restriction could be removed “over the opposition of a party to the decree when the Court finds that ‘the rationale for [the restriction] is outmoded by technical developments.’” 552 F.Supp. at 195. The Court concluded that “there appears to be no reason why the decree itself cannot contain provisions governing the expiration of some of its restrictions.” *Id.* at 196 n. 266. *See also United States v. Western Electric Co.*, 797 F.2d 1082 (D.C.Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987). If the *Swift* standard were to be applied, it would impose an even heavier burden on those who, such as the Regional Companies, seek the removal of the restrictions, than is the case under section VIII(C) of the decree.

²³ *See United States v. Western Electric Co.*, 592 F.Supp. 846, 860 n. 51 (D.D.C.1984); oral argument of James P. Denvir on behalf of the Department of Justice (“In a very real sense, the restrictions are simply the opposite side of the divestiture coin, they are an integral part of the divestiture and proceed on precisely the same theory that divestiture proceeds on”) (Tr. 25179).

²⁴ Varying views have been expressed by the parties and intervenors concerning the meaning of section VIII(C). To the extent

should be governed by the same standard which the Court has applied in determining whether [the restrictions] are required in the first instance. Thus, a restriction will be removed upon a showing that there is no substantial possibility that an Operating Company could use its monopoly power to impede competition in the relevant market.

AT & T, 552 F.Supp. at 195 (footnote omitted).

The rationale for a particular restriction may cease to provide a sufficient basis for continued application of that restriction, if, as the Court stated in 1982, the Regional Companies lost their "ability to leverage their monopoly power into the competitive markets from which they must now be barred." *Id.* at 194. It was anticipated that this would occur when technological developments eliminated the Regional Companies' local exchange monopolies or when substantial changes occurred in the structures of the competitive markets. The Court observed that, upon the happening of such events, the need for the restrictions might be fundamentally undermined.

that the language of that provision requires explanation through its history and purposes as well as the circumstances surrounding its inclusion in the decree, the Court is in a more advantageous position to provide such explanations than is usually true in consent decree situations, for several reasons.

First, unlike in the typical consent decree case, this decree was filed after almost all the substantive evidence of alleged antitrust violations had been presented to the Court, rather than in lieu of the taking of evidence. Compare 15 U.S.C. § 16(b)(2). Second, unlike in the typical consent decree case, the Court conducted an extensive Tunney Act proceeding in the course of which it heard both on principle and on language from many sources, including the Department of Justice, *AT & T*, and the chief executives of several of the soon-to-be-established Regional Companies. Third, unlike in the typical consent decree case, where the Court simply ratifies language agreed upon by the parties, the Court here was the author of section VIII(C), the very provision at issue in the present proceeding. Fourth, the Court provided in 1982 an extensive contemporaneous explanation of the decree (*AT & T*, *supra*, 552 F.Supp. at 131), which no one has questioned as an authoritative interpretation.

Id. Accord, 592 F.Supp. at 858-59, 868; 627 F.Supp. 1090, 1098 n. 26 (D.D.C.1986).

It is important, however, to note precisely what it is that section VIII(C) mandates. That provision places a direct burden upon those who request a removal of a line of business restrictions, for it mandates that any such petitioner *must make a showing*²⁵ that there is *no substantial possibility* that it *could* use its monopoly power to *impede* competition in the market it seeks to enter. As the underlined language indicates, a Regional Company will not be relieved of restriction if it makes no showing at all,²⁶ or if it merely demonstrates (1) that there

²⁵ Anyone attempting to overturn one of the restrictions properly bears a particularly heavy burden because of the strong interest of litigants and the public in the finality of judgments. Many enterprises appear to have made crucial business decisions and invested millions and even billions of dollars in reliance on the ground rules established *inter alia* by the line of business restrictions. See Response of United Telecommunications, Inc., at 10, which claims to have invested nearly \$2 billion "in reliance on the commitment that the BOCs would not be allowed into the interexchange market so long as they could impede competition." This kind of not unreasonable reliance in light of the language of the decree is a factor supporting the proposition that the restrictions should not be lightly overturned.

²⁶ Thus, the Regional Companies are in error when they approach the issue—as several of them do, *see pp. 534-35, infra*—as if if the Court had the obligation to engage in a fresh balancing of considerations in the same manner as would be done in a new antitrust action, or even further from the truth, as if the particular restriction had to be affirmatively justified in this proceeding. The restrictions have already been found to be legitimate under Sherman Act antitrust principles and as being in the public interest under the Tunney Act. On this basis, they were embodied in a judgment the validity of which was twice affirmed by the Supreme Court. See *United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131, 195 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983); *United States v. Western Electric Co.*, 569 F.Supp. 1057 (D.D.C.1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983). Clearly, then, the restrictions may be removed only upon an affirma-

is *no certainty* of anticompetitive conduct, (2) that there is no substantial possibility that it *would*²⁷ use its monopoly power to act anticompetitively, or (3) that its use of monopoly power will not entirely *eliminate* competition in the market it seeks to enter.²⁸

Some of the Regional Companies are advocating a variety of other tests, none of them having any basis either in the decree or in the Supreme Court's *Swift* decision which would apply absent the specific decree provision. Thus, among other arguments made to avoid the section VIII(C) standard are the contentions of Ameritech²⁹ and Pacific Telesis³⁰ that the market entry restrictions imposed in the decree were an inappropriate way to address possible abuses of monopoly power; those of NYNEX that section II(D)(3) of the decree "never had a true basis in antitrust theory," that the decree's treatment of information services as analogous to inter-exchange services was not "apt," and that the trial record is not an appropriate basis for judging the Department's recommendations;³¹ and that of Pacific Telesis that the Court had improperly "made no factual findings of regulatory commission impotence or insufficiency."³²

BellSouth, for its part, makes the curious observation that since the actual parties to the decree have agreed to

tive showing in conformity with section VIII(C) of the decree that they are no longer justified.

²⁷ Thus, a claim or a hypothesis that a Regional Company may not wish to act anticompetitively is not enough; there must be a showing that it would lack the ability to use its monopoly power anticompetitively.

²⁸ See also *United States v. United Shoe Machinery Co.*, 391 U.S. 244, 248, 88 S.Ct. 1496, 1499, 20 L.Ed.2d 562 (1968).

²⁹ Ameritech Response at 36.

³⁰ Pacific Telesis Response at 35.

³¹ NYNEX Response at 89, 31; Comments at 15.

³² Pacific Telesis Response at 42. Compare *AT & T*, 552 F.Supp. at 168.

the elimination of the information services restriction,³³ the Court should implement that agreement "without delay," presumably without regard to the section VIII(C) requirements;³⁴ and U S West, after assuming a (non-existent) commitment by the Court to a *de novo* consideration of the subject at this time, neatly reverses the burden under section VIII(C), claiming that "a strong argument can be made" that the restrictions are to be relaxed unless the evidence "affirmatively shows" a substantial danger of anticompetitive effects. Comments at 25.³⁵ Like some of the others, U S West also insists upon

³³ Actually, AT & T has only suggested that the Court might pursue either of two routes with respect to the information services restriction. It recommended, first, that the Court postpone any decision regarding this restriction, and entertain requests for waivers or modifications if and when sufficient FCC regulations were in effect. Alternatively, it has suggested that the Court modify the restriction to allow a Regional Company to offer information services within its region, and that it retain jurisdiction to reimpose the restriction if ONA, CEI or cost allocation plans (*see* Part VI, *infra*) do not prove to be adequate safeguards. AT & T Response at 59-60.

³⁴ Response to Comments at 2. Compare *United States v. American Cyanamid Co.*, *supra*, 719 F.2d at 565. Elsewhere, BellSouth acknowledges that section VIII(C) governs. Response to Comments at 4-7. Indeed, the law is that "the parties [can] not become the conscience of the equity court and decide for all what [is] equitable and what [is] not, because the court [is] not acting to enforce a promise but to enforce a statute," *System Federation v. Wright*, 364 U.S. 642, 652-53, 81 S.Ct. 368, 374, 5 L.Ed.2d 349 (1961), a rule particularly applicable where the decree contains a specific standard for modification or removal of its provisions.

³⁵ Similarly, BellSouth asserts that the Department of Justice does not bear the burden of proof when it seeks to have a restriction eliminated, Response to Comments at 9-10, notwithstanding the decree language that the petitioner "must make a showing" because, it is claimed, the provision applies only to "the petitioning BOC," not the Department. Even the Department of Justice does not make such a claim. In any event, if the language relied on by BellSouth

treating the current proceeding as if it were a new anti-trust action in which no judgment had ever been entered.³⁶

In view of the fact that what is before the Court is not a new antitrust suit in which the plaintiff would have the burden of proof, but requests for changes in a decree that became final several years ago, these contentions can only be characterized as frivolous. It is plain that collateral attacks on such a decree are inconsistent with the law of the case rule,³⁷ and equally plain that section VIII (C) does not require full-fledged proof of a new "anti-trust injury," but that it speaks only of a "substantial possibility" that a Regional Company "could" impede competition.

More fundamentally, there is not the slightest indication in the record surrounding the negotiation or the approval of the consent decree that, absent the most substantial al-

does not apply to the Department of Justice, that Department may petition for a change in the decree only under the more rigid *Swift* standard.

³⁶ US West Reply Memorandum at 1-17.

³⁷ *De Tenorio v. Lightsey*, 589 F.2d 911 (5th Cir. 1979); see 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 788 (1981). As MCI aptly observes (Reply at 5):

The fundamental unfairness of the Department's and Regional Companies' efforts to relitigate principles already finally resolved in this case might be more apparent if AT & T or MCI responded with a list of all those rulings they found disappointing and wished to relitigate at this time as well. MCI, at least, would be pleased to ask the Court's reconsideration of a range of rulings beginning with the size of the LATAs (see *United States v. Western Electric Co.*, 569 F.Supp. 990, 1003-1008 (D.D.C.1983)), and ending with NYNEX's acquisition of a conditional interest in Tel-Optik (see *United States v. Western Electric Co.*, Civil Action No. 82-0192 (D.D.C. Aug. 2, 1986)) [Available on WESTLAW, DCT database]. But even when limited to issues that have not previously been resolved, this proceeding is sufficiently complex.

termination of market conditions, a judgment that was to end over thirty years of strife in the telecommunications industry and to establish new conditions to govern that industry thereafter, was to be dissolved with respect to one of its two critical elements immediately or almost immediately after entry.³⁸

The Department of Justice goes to some lengths to refute AT & T's point that it agreed to the decree so as to prevent litigation and other controversies regarding the leveraging of the monopoly power, and that the Court should not unnecessarily cause the revival of such controversies.³⁹ In one sense, the Department is entirely correct. Restrictions may not be maintained solely or at all to avoid controversy.

However, the Court cannot help but reflect that one significant reason for the Bell System's agreement to enter into the consent decree was its weariness with constant controversy in the courts, the Congress, before the FCC, and before local regulators, and its willingness to trade those controversies about monopoly bottlenecks for an ability to compete in the inter-exchange and manufacturing markets without being burdened with the very kind of competition from monopolists that it was just abandoning. See, e.g., AT & T Comments at 7-8; Coll, *The Deal of the Century*, at 300-02. The Bell System could not know, and surely did not expect, that the word of the United States Department of Justice would be good only for as

³⁸ Claims to the contrary—that the restrictions were justified or intended to apply only immediately after divestiture, see, e.g., Southwestern Bell Comments at 2; FCC Comments at 4—are so devoid of legal and factual support that, were it not for the fact that there appears to be no practical way to sort out a few statements out of many, and the further fact that several assertions by others are likewise close to or below the acceptable line, sanctions under Rule 11, Fed.R.Civ.P., would have been imposed. See also *Western Electric Co.*, 569 F.Supp. at 1090 n. 139, where the Court referred to the successful invocation of section VIII(C) as “an event, if ever” it should come to pass.

³⁹ Department of Justice Response at 20-23.

long as the individuals then in authority remained in their positions.⁴⁰

B. *Application of Section VIII(C) Language to the Bottleneck Issue*

Section VIII(C), in effect, mandates a two-part analysis for the determination whether a particular line of business restriction should be removed. The first question must necessarily be whether the Regional Companies have retained monopoly control of an "essential facility," the local switches and circuits. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359, rehearing denied, 411 U.S. 910, 93 S.Ct. 1523, 36 L.Ed.2d 201 (1973); *United States v. Terminal Railroad Association*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *see also Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C.Cir.1977), cert. denied, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978). It was their control of these switches and circuits that gave the Bell System its power over the competition. That control enabled the System to foreclose or impede interconnection to its network of the lines of its long distance competitors⁴¹ and of the equipment produced by its manufacturing rivals. It also made possible the subsidization of one activity with the profits achieved in another. *See generally, AT & T*, 552 F.Supp. at 160-63 and 163 n. 137. As long as the Regional Com-

⁴⁰ It is of course hardly unprecedented for a new Administration with a new political or philosophical outlook to substitute regulations reflecting that outlook for others previously issued. *Cf. NAACP v. FCC*, 682 F.2d 993 (D.C.Cir.1982). It is unusual, however, for personnel in the same Administration abruptly to adopt a stance completely at odds with what it had consistently been urging theretofore, and to do so not merely with respect to its own responsibilities—Executive rules or regulations—but regarding a final judicial decree. *See also* notes 25, *supra*, and 108, *infra*.

⁴¹ Without such interconnection, the long distance carriers were unable to reach their ultimate customers, the individual possessors of telephones in the homes, offices, and factories of this nation.

panies retain these same bottlenecks, the potential for the same or similar anticompetitive conduct is plainly still present.

Assuming such continued control, the second question is whether there is a substantial possibility that these companies have the incentive and the ability to use this monopoly power to impede competition in the particular line of business they now seek to enter.⁴²

The answer to the first question will not vary with the particular line of business restriction at issue, but may be answered as a threshold matter applicable to all of the restrictions. The answer to the second question may depend to some extent upon the particular restriction under examination, however, and the various restrictions will accordingly be examined in Parts III, IV, and V, *infra*, in the context of the prohibitions that are sought to be removed by the motions. However, as will be seen below, in practical terms the two tests are not likely to differ much. For unless special circumstances are present,⁴³ as long as a Regional Company maintains monopoly power in an exchange area, it is generally more likely than not that it "could" use that power anticompetitively.

⁴² The Department of Justice is therefore right when it contends that such commenters as AT & T, MCI, Tandy, OPASTCO, and United Telecom are in error when they argue that the restrictions are justified by the mere fact that a monopoly exists in an area. Response at 14-20. Notwithstanding that the Department's reason for this insight is flawed—the Department ascribes it to the Court's rejection of a "quarantine" theory, a term the Court did not use and that does not correctly describe the Court's actions or reasoning with respect to the transfer to the Regional Companies of the ability to market the Yellow Pages and CPE, *see* 552 F.Supp. at 191-94—it is true that, in theory, the mere maintenance by a Regional Company of a monopoly in the local exchange service does not support a restriction: there must also be the ability to use the bottleneck power anticompetitively.

⁴³ *E.g.*, effective regulation.

C. *Bottleneck Control*

In this section of the Opinion, the Court considers the first question; *i.e.*, whether the Regional Companies have retained control of the local bottlenecks, and it answers that question unequivocally in the affirmative.⁴⁴

First. Most of the Regional Companies contend that they do not retain their monopoly power over the local bottlenecks. For example, U S West argues that it lacks bottleneck monopoly power because there now exists substantial consumer bypass.⁴⁵ Ameritech goes to some lengths to attempt to demonstrate that competition has

⁴⁴ In making this and other determinations, the Court has fully considered the legal and factual submissions of the parties and intervenors. On the facts, it necessarily relied to a considerable extent upon Dr. Huber's excellent and thorough study, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, although it did not agree with all of his conclusions. However, other expert opinions have also been considered, the weight being given to them obviously depending upon such factors as the specific knowledge of the particular individual and the detailed or conclusory character of the affidavits and other papers, as the case may be.

Consideration of the affidavits and other materials revealed differences in emphasis and even differences in ultimate opinions, but on most issues critical to the Court's decisions there is a surprising amount of agreement on the actual facts, as distinguished from argument or conclusions drawn from the facts.

No party or intervenor has suggested that a formal evidentiary hearing be held—quite the contrary, *see, e.g.*, US West Reply Memorandum at 6 n. 3—and in this proceeding, which in a sense is a continuation of the Tunney Act proceeding, and which involves some 175 different parties and intervenors, with a wide variety of interests for possible examination and cross-examination purposes, that would in any event have been both inappropriate and impractical.

⁴⁵ Memorandum of April 27, 1987 at 139-43. Bypass is deemed to exist when a telephone customer is able to reach those with whom he wishes to communicate without the use of the facilities of a regional Company or its equivalent in the territories serviced by independents. All of these local facilities, both those of the Regional Companies and those of the independents, are encompassed in the general term "local exchange carrier," or LEC.

reduced the Regional Companies' market power: it points to the existence of competitive alternatives for the switching and privatization of telecommunications systems, end user purchase of switches, and a diminished pool of monopoly revenues for subsidizing competitive products and services.⁴⁶ Ameritech Comments at 12-14; *see also* Bell Atlantic Comments at 12-14; Bell-South Comments at 37-38; and U S West Comments at 40-41.⁴⁷

There is no basis for any of these claims, and no serious effort is made to undermine Dr. Huber's findings to the contrary. Almost all the parties and intervenors other than the Regional Companies themselves acknowledge the continued existence of Regional Company monopoly power.⁴⁸ The Department of Justice, for example, does not urge removal of the restrictions on the ground that the local exchange has lost its bottleneck characteristics; to the contrary, it concedes that the exchange services continue to be monopolies, and that the Regional Companies continue to retain their monopoly power over "the local exchange bottleneck."⁴⁹ As explained *infra*, these assess-

⁴⁶ As shown in Part VII-A-2, *infra*, statistics indicate that the Regional Companies have probably subsidized their competitive ventures with monopoly revenues even in the three years since divestiture, and even though their entry into competitive businesses has thus far been necessarily relatively small.

⁴⁷ U S West's report on bypass (Appendix Tab 31) is forced to recognize, however, that those whom it regards as bypassing the Regional Companies are using those companies as the "pipe through which data or voice is transmitted" (p. 5), and that even the traffic of a customer who has aggregated his traffic and uses PBX switching systems is carried over "relatively few" Regional Company access lines (p. 68). *See also* pp. 538-39, *infra*.

⁴⁸ Even some of the Regional Companies do on occasion concede the existence of such power. Ameritech Response at 10-11; Pacific Telesis Further Comments at 15-16, 29; Southwestern Bell Response at 9.

⁴⁹ Department of Justice Response at 15; *see also* letter dated October 2, 1986, from then Assistant Attorney General Douglas H. Ginsburg to Representative John D. Dingell, Chairman, House Committee on Energy and Commerce, at 12.

ments are correct; the Regional Companies do retain that power over the local bottlenecks, and there is little "bypass" of their switches and circuits.

The exchange monopoly of the Regional Companies has continued because it is a natural monopoly.⁵⁰ Local exchange competition has failed to develop, not so much because state and local regulators prohibit entry into the market by would-be competitors of the Regional Companies, but because of the economic and technological infeasibility of alternative local distribution technologies.⁵¹ The evidence introduced at the trial of this case clearly demonstrated that duplication of the ubiquitous local exchange networks would require an enormous and prohibitive capital investment, and no one seriously questions that this is still true.

Exchange telecommunications is characterized by very substantial economies of scale and scope: as a general matter, the larger a Regional Company's traffic volume, the lower its unit costs. A Regional Company could easily aggregate the one percent of total calls that represent potentially competitive special access traffic with all of its ninety-nine percent monopoly traffic and achieve lower unit costs than could any bypass system.⁵² In other words, objective economic conditions entirely preclude the provision of local distribution functions at a lower or equal economic cost than could the established local exchange car-

⁵⁰ See Hearing before the Senate Committee on Science and Transportation, 97th Cong., 2d Sess. 59 (statement of Assistant Attorney General William Baxter).

⁵¹ Thus, as discussed *infra*, the many arguments predicated upon alleged present or future repeal of state entry prohibitions, *see, e.g.*, Department of Justice Response at 9, 28, 48, are off the mark.

⁵² Huber Report at 2.20; *see also* Comments of Public Utilities Commission of the District of Columbia at 18-19.

rier. *AT & T*, 524 F.Supp. at 1352-53; Department of Justice Memorandum filed August 16, 1981, at 39, 76.⁵³

There is likewise no indication that the Regional Companies' natural monopolies have been eroded by technological changes. Contrary to the assertions of several intervenors, the advent of the more widespread utilization of private branch exchanges (PBXs)⁵⁴ has not significantly, if at all, reduced the efficacy of the Regional Companies' bottlenecks. Some larger businesses have bought PBXs, allowing connection of their telephone lines to those PBXs rather than directly to a local switch controlled by a Regional Company. Huber Report at 2.7. But PBXs, useful as they are for intra-business communications, are not alternatives to the local switches and wires controlled by the Regional Companies. When customers with PBXs place either local or long distance calls to other locations, whether or not a PBX is also available there, the calls must still be carried over Regional Company local loop facilities and switched at one of the Regional Company central offices.

On this basis, if state entry restrictions were lifted today, a "residual core of local exchange service" would remain a natural monopoly. Department of Justice Report at 97-98.⁵⁵ However, as will be seen below, the

⁵³ Bypass is also unpalatable for many enterprises even if they could achieve it, because in bypassing the Regional Company bottleneck by connection of their equipment directly to an interexchange carrier, they would merely be exchanging one form of captivity for another.

⁵⁴ PBXs perform switching and processing functions, forming part of an expanded network. Department of Justice Report at 42. PBXs were of course used long before divestiture, although the scale of such use has been increasing, as indeed it had prior to divestiture.

⁵⁵ Based upon the Huber Report, the Department acknowledges that "[m]ost interexchange traffic still uses local exchange carrier (LEC) facilities, and virtually all customers continue to rely on some

"residual core" of which the Department speaks is almost the entire nation and almost all the local loops and other short haul transmission pathways that connect customers to Regional Companies' central offices and to interexchange carriers' points of presence. See AT & T Comments at 46.⁵⁶

Some of the Regional Companies, while conceding that residential and small business users cannot do without the Regional Company monopoly bottlenecks, assert that this is not true with respect to the large users.⁵⁷ As the Huber Report conclusively demonstrates, however, that is just not so. The Report notes that even very large private network customers still employ far more switched (*i.e.*, Regional Company) access lines than dedicated (*i.e.*, private) access lines. Huber Report at 3.44-3.46. As the Report further found:

Users' requirements for a bundle of local and interexchange services can make any discrete focus on alternative high capacity systems misleading. *Control over a single, essential piece of network, even a seemingly small and comparatively inexpensive one . . . may give LEC's [i.e., Regional Companies] 'account control,' that is a guaranteed foot in the door with large customers, a window on their business, and the power to insist on dealing directly with them (emphasis added.)*

LEC facilities in connection with interexchange services." Response at 29. For an explanation of the term "LEC," see note 45, *supra*. The Regional Companies themselves still control eighty-one percent of the nation's local access lines. Huber Report at Table G.4.

⁵⁶ As AT & T correctly points out, the natural monopoly character of the provision of special access lines is proved by the fact that not a single Regional Company has even attempted to provide alternatives to local access services in the territory of another Regional Company. Response to Comments at 29.

⁵⁷ See, e.g., BellSouth Comments at 37-38; Bell Atlantic Comments at 10-13.

Huber Report at 3.45. And Dr. Huber further concluded that fully forty to fifty percent of large business customers' payments for private networks are attributable to access provided by Regional Companies. Report at 3.46-3.49, Figure IX.30, Table IX.31.

To be sure, the Department of Justice and Dr. Huber refer at some length to technological developments,⁵⁸ particularly the emergence of a geodesic network.⁵⁹ However, they both acknowledge—as they must—that the geodesic network does not now exist, and that all these developments will, if ever,⁶⁰ impact the Regional Com-

⁵⁸ The broadening consumption of electronic equipment, for example, does not reduce the need for Regional Company transmission services; it may actually increase it. See Comments of Independent Data Communications Manufacturers Association, at 18-19.

⁵⁹ These technological developments form the basis for Dr. Huber's conclusion that the exchange network is being transformed from a "pyramid" to a "geodesic" network. Huber Report at 1.2, 1.6. According to Dr. Huber, in a pyramid network, there are relatively few switches that are arranged in a vertical hierarchy. This vertical switching network was predicated on the allegedly earlier economic reality that switching was very expensive relative to transmission, and the local Operating Companies had a bottleneck monopoly over entry into the network because they controlled the gateway switches. In a geodesic network, according to Dr. Huber, the number of switches and connections between them are much greater, and consequently the processing and control functions are decentralized. Dr. Huber accordingly concluded that transformation to geodesic networks will be due to the decrease in costs of switching and processing brought about by technological innovation. Huber Report at 1.2-1.6. A geodesic network erodes bottleneck control, he contends, because, in contrast to the pyramid which could support only a single integrated provider of telecommunications services, it can support many interconnected, vertically integrated providers. *Id.* at 1.6-1.7, 1.30.

⁶⁰ AT & T challenges the very premise of Dr. Huber's geodesic network theory, claiming that it rests on a misunderstanding of principles of engineering and network design so basic that they were stipulated to by the parties to the AT & T case. AT & T

panies bottleneck control only in the future.⁶¹ Department of Justice Report at 42-43; Huber Report at 2.23, 2.25-26.⁶² Indeed, the Department relies on Huber's conclusion on the dispersal of electronic intelligence only for the proposition that it would be difficult for the Regional Companies to maintain a monopoly over local switching and transmission "in the long run." Report at 42-43. However, the proper inquiry under the test mandated by section VIII(C) is whether the Regional Companies control bottlenecks now, not whether they will still do so "in the long run."⁶³

The complete lack of merit of arguments that economic, technological, or legal changes have substantially eroded or impaired the Regional Company bottleneck monopoly power is demonstrated by the fact that *only one-tenth of one percent of inter-LATA traffic volume, generated by*

Comments at 50-51 n.*. Since it is clear, as stated *infra*, that, whatever may be its future, the geodesic network does not exist *now*, it is not necessary to resolve that dispute.

⁶¹ It is thus ingenuous to speak of the geodesic network as if it existed at the present time. See, e.g., Response of NYNEX at 14 ("Thus, as Dr. Huber notes, 'the geodesic network is structurally competitive'" (emphasis added)). No such statement can be found at the page cited.

⁶² An analysis conducted by experts in telecommunications economics and regulation for Economics and Technology, Inc., and submitted to the Court by the Ad Hoc Telecommunications Users Committee and the International Communications Association, likewise concludes that "the geodesic model that Dr. Huber has envisioned does not now characterize the U.S. telecommunications system, nor will it do so in the foreseeable future." Analysis at 11. The study also reports that virtually all the available information indicates that business tones are not more likely to be generated by PBXs than by Regional Company central office switches. Analysis at 36-40.

⁶³ At the time of the next triennial review the Court will, of course, consider whether the Huber predictions regarding a geodesic network have, in fact, been fulfilled.

one customer out of one million, is carried through non-Regional Company facilities to reach an interexchange carrier.⁶⁴ Huber Report at 3.9, Table IX.5.⁶⁵ To put it another way, 99.9 percent of all interexchange traffic, generated by 99.9999 percent of the nation's telephone customers, is today carried entirely or in some part by the Regional Companies (or their equivalents in the territories served by the independents).⁶⁶ *The Department of Justice found only twenty-four customers in the entire United States who managed to deliver their interexchange traffic directly to their interexchange carriers, bypassing the Regional Companies.* Department of Justice Report at 80-81.⁶⁷ It is clear, therefore, and the

⁶⁴ More precisely, these figures include all LEC facilities, that is, both the local exchanges controlled by the Regional Companies and those under the control of independent telephone companies. See note 45, *supra*.

⁶⁵ Elsewhere, Dr. Huber indicates that the local exchange carriers hold a 96.6 to 99.8 percent share of the excess market. Report at 1.20, Table G.15. The continuing market power of the Regional Companies in the exchange market is evidence by increases in LEC private line rates and by the willingness of the Regional Companies to price discriminate in tariffing their private line service (e.g., by charging more to connect an end user to an interexchange carrier than to connect two end users). Huber Report at 2.9, 2.19-2.22.

⁶⁶ Thus, Regional Company contentions to the effect that they "have no bottleneck control" over large customers whose local networks "are now springing up," Bell Atlantic Comments at 13, or that division of the national market among seven entities leaves each without power to impede competition, Ameritech Comments at 8-9, are wholly at odds with the facts.

⁶⁷ Similarly, Dr. Huber estimates that facilities bypass accounts for only 250 million minutes of use per year as compared to 170 billion minutes of use carried by the Regional Companies. Huber Report at 3.8-3.9 (Table IX.4). See also the Bypass Report of the National Telecommunications and Information Administration of the U.S. Department of Commerce (NTIA) at 23, which notes that the Regional Companies "have thus far not experienced significant revenue losses" due to competition from bypass providers. According to an analysis performed by Economics and Technology, Inc.,

Court finds, that no substantial competition exists at the present time in the local exchange service,⁶⁸ and that the Regional Companies retained control of the local bottlenecks.

III

Interexchange Services

A. Introduction

Section II(D)(1) of the decree prohibits the Regional Companies from providing "interexchange telecommunications services." *AT & T*, 552 F.Supp. at 227.⁶⁹ "Interexchange telecommunications" is defined as "telecommunications between a point or points located in one exchange telecommunications area and a point or points

only about 1,000 non-LEC circuits are used to connect customers to interexchange carriers versus more than 100 million LEC-provided circuits. Comments of International Communications Association at 8.

⁶⁸ The lack of any but the most minuscule bypass may also have a bearing upon the FCC's effort, partially crowned with success, to impose access charges upon the ratepaying public. These efforts have been represented as a necessary measure to halt the menace of growing bypass and the resulting abandonment by large users of the regular network, and hence as a necessary defense against a threat to the financial health of the entities managing that network. FCC Memo Opinion and Order in 78-72, August 22, 1983 at 6. The Huber Report demonstrates that the premise for this activity has been largely imaginary. See *Western Electric Co.*, 569 F. Supp. at 1091 n.147, where the Court noted in 1983 that "[t]here is no reason to believe that bypass on a large scale is imminent."

⁶⁹ Interexchange services include both facilities-based services and the resale of the services of others. They are not limited to transmission, but in certain contexts include related activities such as interexchange traffic routing, the selection of interexchange carriers through least-cost routing or shared tenant services systems, and the marketing of the services of interexchange carriers. *United States v. Western Electric Co.*, 627 F.Supp. 1090, 1099-1103 (D.D.C.), *aff'd in part and rev'd in part*, 797 F.2d 1082 (D.C. Cir. 1986).

located in one or more other exchange areas or a point outside an exchange area." *AT & T*, 552 F.Supp. at 229. "Exchange areas," for purposes of the decree, are the Local Access Transport Areas (LATAs), established by the individual Regional Companies with the approval of the Court, *AT & T*, 552 F.Supp. at 229, each of the LATAs encompassing "one or more contiguous local exchange areas serving common social, economic, or other purposes." *Id.* Loosely speaking, interexchange service may be equated with long distance service (although some long distance service occurs within a LATA and is therefore not interexchange service within the meaning of the decree).

The factual predicate for the interexchange restriction was the large volume of evidence presented at the trial demonstrating that (1) the local exchange facilities operated for the Bell System by its twenty-two Operating Companies were essential for any firm that desired to provide long distance service, because without interconnection with the Operating Companies' switches and circuits it had no means of reaching the ultimate customer, the local possessor of a telephone instrument, and (2) the Bell System, through the Operating Companies, had consistently sought, often successfully, to exclude competition in the provision of long distance service by restricting interconnection to these local facilities. *AT & T*, 552 F.Supp. at 161-62; *AT & T*, 524 F.Supp. at 1353-57.

More specifically, the evidence indicated that the Bell System's refusal to provide local interconnection to its long distance competitors, such as MCI, on fair and non-discriminatory terms and conditions, and its manipulation of the exchange access and of the tariff system,⁷⁰

⁷⁰ Tariffs filed with the FCC became effective at once or within a brief period of time of their filing by the carrier, and they are deemed to have, in effect, the force of law. So many telephone tariffs were and are being filed that the Commission frequently has no time or opportunity to review them in any detail, if at all. Even when they are reviewed and found wanting, the Commission can

precluded meaningful competition in the provision of long distance services. *AT & T*, 552 F.Supp. at 160-63; *AT & T*, 524 F.Supp. at 1358. To put it more directly, the Bell System managed for several decades by a variety of means to stave off significant competition in the long distance market, and to that effort the local Operating Companies and the monopolies they represented were the key component. All of this was done to protect the Bell System's own long distance component—the Long Lines—from outside competition.

In determining what remedy would most effectively protect in the future against similar anticompetitive abuses, both the parties and the Court carefully considered and rejected the alternative of improved FCC regulation. As explained elsewhere herein, federal and state regulation had simply not been capable of preventing the antitrust problems that the decree was to resolve. The Department of Justice argued, and introduced extensive evidence to prove, that the local exchanges are so complex, so technologically dynamic, and characterized by such vast joint and common costs that no set of regulations could realistically prevent competitive abuses. It also appeared that when the FCC did act, its efforts were largely unsuccessful.

For example, the trial record shows that, despite FCC orders to do so entered in 1971,⁷¹ in 1973,⁷² and in

usually do no more than to suspend them for a brief period. Telephone companies can, and frequently do, file new tariffs just as quickly as old ones are questioned, and the result is that regulatory oversight is in practice often slight.

⁷¹ *Specialized Common Carriers Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975).

⁷² Letter from Bernard Strassburg, Chief, Common Carrier Bureau (dated October 19, 1973); *see also Bell System Tariff Offerings of Local Distribution Facilities for Other Common Carriers*, 44 F.C.C.2d 245 (1973).

1974,⁷³ the Operating Companies failed and refused to provide its competitor MCI with the so-called FX and CCSA services that company needed to operate effectively in the long distance market, and that the interconnections necessary for MCI's provision of full-fledged long distance service were not provided until 1978, following the entry of orders of the Court of Appeals for this Circuit in the two *Execunet* cases. See note 12, *supra*. See also *AT & T*, 552 F.Supp. at 172 n. 172. There were also unending struggles regarding protective connecting arrangements,⁷⁴ the location of competitors' switching equipment, and other similar and dissimilar anticompetitive problems.

Accordingly, the parties agreed and the Court concluded, based upon the type of proof referred to above and in Part I, *supra*, and upon the more general and broader evidence of the ineffectiveness of regulation, Part VI, *infra*, that regulatory measures would not be effective in ensuring interexchange competition free of coercion by the carrier in control of the monopoly bottlenecks. A judicial, regulatory-type detailed injunction was likewise discarded as probably equally ineffective. *AT & T*, 552 F.Supp. at 167-68. That, then, left the long-discussed remedy of divestiture, and it was chosen by the parties and approved by the Court.

It was on this basis that the decree adopted two closely related remedies: *AT & T* would continue to provide long

⁷³ *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, *aff'd sub nom. Bell Telephone Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed.2d 684 (1975).

⁷⁴ These were the devices which the Bell System insisted had to be affixed to any lines or equipment not made by Western Electric as a prerequisite to their attachment to the national telephone network.

distance service,⁷⁵ but it would be stripped of the Operating Companies with their local monopolies, the essential means for anti-competitive acts against other long distance providers. The Regional Companies⁷⁶—the heirs to the local exchange service and hence to the monopoly bottlenecks—would, in turn, be prohibited from exercising the long distance function, thus depriving these companies of the incentive for manipulation or discrimination in the use of the local facilities and of the ability to manipulate or discriminate.⁷⁷

In approving the interexchange restriction contained in section II(D)(1) the Court reasoned that, to have permitted the Regional Companies to provide interexchange services, would have “undermine[d] the very purpose of the proposed decree—to create a truly competitive environment in the telecommunications industry.” *AT & T*, 552 F.Supp. at 188. The Court found that, were the Regional Companies allowed to be present in the interexchange market while they also maintained monopoly control of the local telephone markets, they would be able to pursue precisely the same course as had the Bell System: (1) to discriminate in a variety of ways against

⁷⁵ Other issues, that is, those involving manufacturing and information services, are discussed in Parts IV and V, *infra*.

⁷⁶ The seven Regional Holding Companies took over the twenty-two Operating Companies.

⁷⁷ As the Court explained at the time:

What is significant about these [discriminatory] events is that AT & T was able to adopt the policies described above in large part because of its control over the local exchange facilities. For example, it was because of its ownership and control of the Local Operating Companies—whose facilities were and are needed for interconnection purposes by AT & T's competitors—that AT & T was able to prevent these competitors from offering FX and CCSA services. Similarly, AT & T was able to deter competition by manipulating prices for access to the Operating Company networks (footnote omitted).

AT & T, 552 F. Supp. at 162.

their non-monopoly competitors through judicious use of the local monopoly; and (2) to "subsidize their interexchange prices with profits earned from their monopoly services." *Id.*

In order to facilitate the growth of a "truly competitive telecommunications industry," the Court therefore approved the proposed decree language prohibiting the Regional Companies from entering the interexchange services market⁷⁸ as an integral and vital part of the prophylactic remedy represented by the decree. It is that prohibition that is now again before the Court on the basis of requests for its removal.

B. *Original Department of Justice Proposal*

In its Report submitted on February 2, 1987, the Department of Justice, in addition to recommending removal of the restriction on mobile interexchange services (*see* Subpart F, *infra*), advocated that the basic interexchange restriction embodied in section II(D)(1) of the decree be sharply cut back. Instead of being prohibited from engaging in interexchange services, each Regional Company would be authorized to render all such services, with the exception only of those interexchange calls that originated or terminated in an area in which the particular company had a legally protected monopoly. Department of Justice Report at 59, 68-76.⁷⁹ The Regional

⁷⁸ The Court also concluded that the Regional Companies would have substantial incentives to subvert the decree's equal access requirements because they would "stand to gain business if other carriers were disadvantaged by poor access arrangements and high tariffs." *AT & T*, 552 F. Supp. at 188.

⁷⁹ The Department reasoned that the bottleneck monopoly power could not be effective if the company vested with that power operated only outside its own region, and it further concluded that any concern existing at the time of divestiture that the Regional Companies would operate as a unified group of local exchange

Companies by and large initially supported this approach, albeit with substantial modifications.

However, following its study of the comments its proposal had generated,⁸⁰ the Department reversed its field. Its subsequent submissions to the Court concluded both that the Regional Companies retained the ability to use their control of the monopoly bottlenecks to impair inter-exchange competition, and that the in-region out-of-region proposal itself presented insuperable practical difficulties. Accordingly, the Department withdrew that proposal. Response of the United States at 24-28. The Court agrees with both prongs of the Department's present position.

The bottleneck control issue is discussed at some length in Part II of this Opinion, and no purpose would be served by a detailed reiteration of that discussion here. Suffice it only to say once again that the monopoly bottlenecks continue to exist essentially in unchanged scope and form, and that they continue to provide the same basis for anticompetitive activity as they did prior to the Bell System break-up.⁸¹ It is worthwhile, however, to describe briefly the basis for the Court's conclusion, paralleling that of the Department, that it is not practical to lift part of the interexchange restriction so as to permit each

monopolies "has proved unfounded." Report at 74. The Department also stated that the opportunities for cross-subsidization would be limited because the likely geographic separation of facilities and personnel would permit detection of any attempts at such cross-subsidization. Report at 76.

⁸⁰ Of the seventy entities that addressed the Department of Justice proposal, only two supported it completely.

⁸¹ As National Telecommunications Network (NTN) correctly states, "[f]or example, if Pacific Telesis were permitted to compete with NTN to sell private lines in the eastern United States, it would have an incentive to give NTN inferior access to points in the Pacific Telesis region, and so damage NTN's reputation in the industry for service reliability and other considerations." Comments at 16.

Regional Company to offer interexchange services outside but not inside its own region.

The plain and universally recognized fact is that the market for interexchange services is national. Because of that overriding fact, it is unlikely in the extreme that a Regional Company could compete successfully with other interexchange companies (or even exist in the interexchange market) if, unlike its competitors, it were able to offer service in only parts of the country.⁸² The Regional Companies immediately grasped that flaw in the Department's proposal, and they sought at once to expand it so as to eliminate the conceptually vital in-region exclusion.⁸³ In short, they asked that the interexchange restriction be eliminated in its entirety—a solution that the Department had properly rejected even in its original submission.

Beyond that, it is clear that it would be technically difficult to determine what Regional Company facilities were being used to carry traffic to and from its in-region as distinguished from its out-of-region facilities, or what marketing, consulting, or administrative activities related only to the permitted out-of-region services. This uncertainty would greatly facilitate violations and evasions of the new standard, a development to be avoided if at all possible.

⁸² Few, if any, individuals would subscribe to or use U S West, for example, if they could not use that company's long distance service for calls originating or terminating anywhere in the vast area between Arizona and Minnesota. Both the International Communications Association and the Ad Hoc Telecommunications Users Committee have stated that their members would not be interested in purchasing network services that would reach only six of seven regions. ICA Comments at 10; Ad Hoc Telecommunications Users Comments at 73.

⁸³ As Ameritech stated, the Department's proposal was "a hollow gesture unless the . . . restriction is also lifted for . . . private line networks." Ameritech Comments at 49. The Federal Communications Commission agreed. FCC Comments at 36.

One inevitable consequence of the telecommunications environment created by the Department's six-region proposal would be to confront the Court with the never-ending task of deciding close, finely-tuned disputes between the Regional Companies and their competitors regarding questions such as those referred to above. The result would be that, instead of phasing out its oversight over a substantial part of the telecommunications industry, the Court would become even more deeply and intrusively involved in that task. None of the parties could welcome such a development. Nor does the Court.

For these reasons, to the extent that the original Department of Justice recommendation still survives in motions filed by others,⁸⁴ it must be and it is hereby rejected.

C. *Retention of the Restrictions With Liberal Grant of Waivers*

The Department now recommends that the interexchange restriction be retained, but that the Court hereafter entertain requests for waivers of that restriction as soon as state and local regulation is lifted with respect to a particular area or locality. Department of Justice Response at 9, 28, 48. That recommendation has even less merit than the Department's original proposal, for a number of reasons.

First. The recommendation proceeds on the basis of the erroneous assumption that repeal of local regulation will open the local exchange monopolies to competition. To be sure, as long as states and localities prohibit outsiders from competing with the local Operating Com-

⁸⁴ Motions seeking the complete removal of the interexchange restriction include those filed by NYNEX Corporation, BellSouth, U S West, Inc., Southwestern Bell Corporation, and Pacific Telesis Group. Ameritech's and Bell Atlantic's motions request a more limited form of relief from the interexchange restriction, resembling somewhat the Department's original recommendation.

panies, the monopolies will continue to exist. But the reverse is not true. Even if all state and local regulation prohibiting competitive entry into the local exchange market were to be repealed tomorrow,⁸⁵ and anyone were free, as a matter of law, to sell local telephone service, the exchange monopolies would still exist substantially in the same form and to the same extent as they do now. The conditions that caused these monopolies to emerge in the first place—the need for connecting local consumers of telephone service to the telephone company central office switches by means of wires strung or buried in millions of places throughout America's cities and rural areas, and the enormous capital resources required for this project—preclude any thought of a duplication of the local networks.

Only when a practical and economically-sound method is found for large-scale bypass or for connecting local consumers by a different method—as microwaves and satellites were ultimately found to be feasible for handling long distance traffic—can the Regional Companies' local monopoly be regarded as eroded. Accordingly, waivers of the restriction could not be granted based on an absence of state and local regulation unless these regulatory changes were accompanied by substantial changes in telecommunications technology, the economics of the provision of local telephone service, or both.

Second. As experience has shown, to hold out to the Regional Companies the prospect of piecemeal waivers or similar judicial orders under the imprecise conditions suggested by the Department of Justice would (1) serve to encourage their resistance to the grant of full equal access and (2) cause them to redouble their efforts to nibble incessantly at the edges of the restrictions, in the expectation that this would result in their complete en-

⁸⁵ Several states have recently enacted laws prohibiting local exchange competition. Opposition of Electronic Industries Association and Telecommunications Technologies Group at 16-18.

try into the prohibited markets. See *United States v. Western Electric Co.*, 592 F.Supp. 846, 867-68 (D.D.C. 1984); see also Reply of Competitive Telecommunications Association at 5-8. In fact, executives of and spokesmen for the various Regional Companies rarely miss an opportunity to explain their desire, nay their right, to operate interexchange networks, and the groundwork for such expansion is laid whenever and wherever possible. See, e.g., statement of Thomas E. Bolger, Chairman of Bell Atlantic, *Washington Post*, December 30, 1985, Business Section at 1. The uncertainty, turmoil, and confusion that would be created in the telecommunications industry by implementation of the Department's recommendation are as undesirable as they are unnecessary.

Third. As stated above, the Court has for some time sought to find means for phasing out or reducing its "oversight" responsibilities consistently with its responsibilities under the decree.⁸⁶ Several of the decisions made today are steps in that direction. See Parts VIII and IX, *infra*. However, if the Department's recommendations were adopted, the Court would become involved in detailed regulation of the Regional Companies with a vengeance.

The Court would be constantly reviewing requests for removal of interexchange and information services restrictions on a state-by-state, possibly county-by-county, basis, in order to determine whether local regulation had changed sufficiently to allow such removals in the particular area. In order to carry out that responsibility, the Court would have to review and to scrutinize, on an ongoing and unending basis, the effect, and possibly the purpose, of old and new state and local regulation of telecommunications providers all over the United States.⁸⁷

⁸⁶ See, e.g., *Western Electric Co.*, 592 F. Supp. at 873-75 (establishing procedure whereby Department of Justice reviews requests for waivers of line of business restrictions).

⁸⁷ One example is cited by the Utilities and Transportation Commission of the State of Washington which points out that it has

It is difficult to imagine a more systematic and offensive intrusion into local affairs, and on this basis, one intervenor aptly describes the Department of Justice proposal as "an affront to federalism." CP National Corporation Comments at 6.

The task prescribed by the Department of Justice is one that a federal court should undertake, if at all, only if that is absolutely essential for the protection of federal constitutional or other legal rights. Clearly, that is not the situation here, and the Court accordingly declines to enter that thicket.

For these reasons, the Court will not entertain applications for waivers that are predicated only upon changes in state or local regulation. Of course, if *prima facie* showings are made that, for technological or economic as well as legal reasons, competition in local exchange markets is feasible and has, in fact, emerged on a substantial scale, requests for removal of particular restrictions will be both entertained and granted. However, it may well be suspected that this will turn out not to be a piecemeal process as the Department of Justice envisions it, but an eventual broad-scale removal of restrictions as new technology or new market structures emerge on a nationwide basis.⁸⁸

D. *Complete Removal of the Restriction*

That leaves, then, the motions filed by the Regional Companies, supported by almost none of the other over one hundred seventy entities that have filed papers in

permitted local resale and shared tenant services but not the provision of basic local service by more than one telephone company in the same territory, adding, "[i]s the Department suggesting that the Court interpret state law to determine whether the Washington situation is a legally protected monopoly?" Comments at 16.

⁸⁸ It is unlikely that, in a nation with vigilant competitors and an absence of interstate barriers to the flow of ideas and commerce, any such development will be confined to a single exchange area or a single region.

this proceeding except the Federal Communications Commission,⁸⁹ that the restriction on the provision of interexchange services be removed *in toto*.

These requests are met initially by the obstacle, discussed *supra*, that, with the exception of the minuscule amount of traffic that bypasses the Regional Companies' facilities, their monopoly bottlenecks are as solid and pervasive as they were when the decree was entered. It is equally clear that nothing has occurred to change the decree conclusion that those in control of the local bottlenecks have the incentive and ability to use their monopoly power anticompetitively in the interexchange market.

In view of the history of past abuse of the bottlenecks in the Bell System's long effort to disadvantage long distance competitors detailed *supra*, and the continuing solidity and pervasive nature of the bottlenecks, a dissipation of the ability to act anticompetitively can be assumed only if some other fundamental change has occurred in the situation—a change that would permit the Court to find that, notwithstanding the continued existence of the local bottlenecks, the risk of Regional Company anticompetitive conduct in the interexchange market has disappeared.

⁸⁹ The FCC position does not, in any event, meet the section VIII(C) standard for removal of the restriction. The Commission simply never liked the decree with its restrictions to begin with, and it still does not. Even before the decree was entered, the FCC expressed its view that the restrictions on the Regional Companies were both unnecessary and unwise, Brief of Federal Communications Commission as Amicus Curiae at 30 (filed April 30, 1982), and earlier this year, Mark Fowler, then the Commission's chairman, stated that the Commission "consistently" felt that the decree should not have restricted the Regional Companies. Letter from FCC Chairman Mark Fowler to John Dingell, Chairman of House Committee on Energy and Commerce, at 1 (November 13, 1985). The decree herein is a final judgment of a federal court and thus valid and binding, the FCC's views as to its wisdom to the contrary notwithstanding.

It is suggested by the Regional Companies that changed circumstances have occurred in five respects:⁹⁰ (1) more effective regulation by the FCC; (2) the existence of the seven Regional Companies in lieu of the one Bell System; (3) "substantial implementation" of equal access;⁹¹ (4) the GTE analogy; and (5) the possibility of new anti-trust suits.

The issue of regulation, which is common to the disputes involving all three of the core restrictions, is discussed with respect to all of them in Part VI, *infra*. As for the remainder, some of the claimed developments have not, in fact, occurred, and others have not had an effect on the interexchange services market.

1. *Division of Bell System Into Seven Companies*

Much is made by the Regional Companies of the circumstance that they are seven while the Bell System was

⁹⁰ In addition to arguments concerning these claimed changes, some of the Regional Companies resort to hyperbole having little relationship to the realities. Thus, Ameritech asserts, contrary to hundreds of pages of briefs, that "even the commentators that oppose regional company entry into their markets do not seriously suggest that any regional company could gain market power" over the markets at issue here (Reply at 1-2); that "nothing that any carrier says can obscure . . . the proliferation of bypass options since 1982" (Reply at 26) (*compare* Part II-B, *supra*); and that "after three rounds of extensive briefing by all elements of the industry, involving the filing of 190 briefs comprising approximately 8,000 pages, have the opponents presented *any* evidence of Ameritech abuse of local exchange operations" (Reply at 33) (emphasis in original) (*compare* Part VII-A, *infra*). Such exaggeration does not enhance credibility.

Among the more imaginative additional arguments in favor of removal of the restriction is that of Bell Atlantic which points to the fact that the interexchange restriction has been the source of controversy and litigation before this Court. Memorandum in Support of Motion at 33-35. The Regional Companies cannot bootstrap their way out of the restriction by violating it and then, when someone complains, claiming that the restriction causes controversy.

⁹¹ See also Department of Justice Report at 68-70.

only one. The difficulty with the arguments advanced based upon that undoubted fact is that the independence of the Regional Companies from the Bell System does not constitute a new development; it was mandated in the very same decree that also mandated the interexchange restriction. The decree, in fact, assumed the necessity for that restriction notwithstanding the breakup of the Bell System into seven or more new entities.⁹²

During the proceedings that led to the approval and entry of the decree, the Bell System advised the Court that its evaluation of the decree could and should be premised on the existence of seven Regional Companies,⁹³ and the Court did just that.⁹⁴ The record shows without the slightest ambiguity that the consequences that were to flow from the divestiture and the restrictions were identified and taken into account in 1982 with respect to the post-divestiture Regional Companies, not merely the pre-divestiture Bell System.

That was so because the crux of the problem prior to the divestiture was not so much the size of the Bell System (although that played a part) but its control of the local exchange bottlenecks. Now that the control of these bottlenecks has shifted to seven regional entities, they must necessarily be limited as was the Bell System to prevent their exploitation of these bottlenecks, absent some substantive change. And, as discussed in detail above, there has been no substantive change: the bottlenecks are as pervasive as ever. It is undoubtedly for these reasons that the Department of Justice, too, recog-

⁹² Under the decree the restriction would have applied even if the Bell System had been divided into twenty-three independent entities (AT & T and the twenty-two Operating Companies). The combination of the Operating Companies under the aegis of seven holding companies thus constituted less of a dilution of centralization than the decree allowed.

⁹³ AT & T Reply Comment dated May 21, 1982, at 4-5.

⁹⁴ *AT & T*, 552 F. Supp. at 142 n.41, 201, 214 n.346.

nizes that "the fact of divestiture itself" is not "a sufficient changed circumstance" to justify a modification of the restrictions. Reply at 57.⁹⁵

The Regional Companies further argue that now, unlike then, benchmarks exist by which the performance of one of them can be measured against that of the six others.⁹⁶ Again, the possibility of the existence of benchmarks was necessarily included in the decree assumption which imposed the restrictions upon the several successors of the Bell System. Beyond that, as discussed in Part VI, *infra*, the Regional Companies are free, by virtue of the regulations proposed by the FCC, to adopt entirely dissimilar accounting and other procedures, making impossible intelligent benchmark comparisons between and among them.⁹⁷

2. Equal Access

As concerns the issue of equal access mandated by Appendix B of the decree on which several of the Regional Companies rely as a changed circumstance, it is by no means established that this objective has been achieved. Several motions are pending before the Court in which the question of compliance by the Regional Companies with their equal access obligations is very much

⁹⁵ The Regional Companies are far from being of a size that can easily be regulated or whose operations can be otherwise be scrutinized without difficulty. The smallest would rank in the Fortune 20 in terms of assets and the Fortune 50 in terms of sales. Comments of Dun and Bradstreet at 40-41. Moreover, their complex organizational structures compared to that of the Bell System further complicates any effective scrutiny of their activities to determine whether they are consistent with the decree. See sections V and VI of the decree.

⁹⁶ See, e.g., Ameritech Reply at 3-7.

⁹⁷ Additionally, the Regional Companies are, of course, quite capable of cooperating with each other, if necessary, to defeat any benchmark-type comparison scheme.

contested.⁹⁸ These motions raise substantial issues indicating Regional Company violations of their equal access obligations which the Court will have to resolve on their merits.⁹⁹ At least pending that resolution, removal of the restrictions could not conceivably be predicated upon an assumed fulfillment by the Regional Companies of their equal access obligations.

More fundamentally, however, even if the equal access requirements had been fully met,¹⁰⁰ a valid basis would not exist for a removal of the restriction on equal access grounds. If equal access had been all that was involved, the decree could have simply mandated the Bell System to provide such access in the same manner as Appendix B to the decree prescribes it for the Regional Companies. Instead, the decree directs the massive divestiture and compliance with the line of business restrictions. It can only be concluded from that choice that equal access was intended to reinforce the decree's basic relief provisions, not to be a substitute therefor.

Finally, equal access is not an objective that, once achieved, remains fixed and cannot be undone. On the contrary; to the extent that the Regional Companies have

⁹⁸ Furthermore, as the Kentucky Public Service Commission observes, Regional Company conversion plans indicate that many small or rural end offices will not be converted to equal access until into the 1990s or even well beyond the year 2000. Comments at 16.

⁹⁹ That the motions are not frivolous is demonstrated by the fact that several Regional Companies even now object to the grant of equal access to interexchange and information service providers, *e.g.*, Bell Atlantic Response at 2-9; U S West Response at 6-7, 9-10, and that these same companies and several other object to the suggestion of the Department of Justice that they provide equal access with respect to their cellular operations. See Subpart F, *infra*.

¹⁰⁰ As ALC Communications Corporation correctly notes, by any standard, approximately thirty percent of the lines served by the Regional Companies nationally have *not* been converted to equal access. Comments at 14.

the incentive, the ability, and the freedom under the decree to do so, they may be expected to chip away at equal access as new configurations, changed technologies, and novel services provide the requisite opportunities.

The Bell System was for decades under various judicial and regulatory mandates not to discriminate with respect to access by competing interexchange carriers, and it managed as consistently to evade these mandates. The bottleneck monopoly provides opportunities for a wide range of means to disadvantage competitors.¹⁰¹ The Department of Justice has correctly stated that "without significant technological and market structure changes, these dangers will not disappear even after full equal access is achieved, for as the *AT & T* case showed, network standards and information flows can be used by an exchange provider to disadvantage competitors." Reply at 62.

3. *The GTE Analogy*

Several Regional Companies¹⁰² argue that, inasmuch as the Court approved the antitrust consent decree involving GTE, which does not include line of business restrictions similar to those in the instant decree, consistency requires the removal of the restrictions here. There is no merit to that contention.

¹⁰¹ It is alleged that in each of the states that allows intrastate competition, the Regional Companies are disadvantaging their intra-LATA competitors (*e.g.*, by denial of equal access, refusal to permit Centrex to be used to deliver long distance traffic to independent carriers, denial of WATS access). Comments of ALC Communications Corporation at 18-23. If those claims are true in whole or in part—and the Court has insufficient facts at this time on which to base a conclusion—it would not augur well for the future should be restrictions on interexchange be lifted.

¹⁰² See, *e.g.*, Southwestern Bell Comments at 25-27; U S West Comments at 39-40.

In the first place, it cannot reasonably be argued that the adoption of the GTE decree constitutes a change in terms of the section VIII(C) standard of the decree in the instant case. To put it another way, the Regional Companies lack standing to seek a modification of this decree merely because the Department of Justice agreed to a consent decree in another antitrust suit with an entirely different defendant, and the Court approved that decree. The Department of Justice was surely not required under law to insist upon parity in the *GTE* case with the remedy adopted in the *AT & T* case.¹⁰³ As for the Court, it was obliged to give, and it did give, considerable deference to the parties and the agreement they had reached when it, in turn, passed on the GTE consent decree. *AT & T*, 552 F.Supp. at 151.¹⁰⁴

Furthermore, when the Court approved the GTE decree in December 1984, it carefully considered the similarities and differences between the Regional Companies and GTE, and it concluded, agreeing with the Department of Justice, that different treatment was justified for the following reasons:

To be sure, in some significant respects, particularly size and scope of operations, GTE more or less matches the Bell Regional Holding Companies (at least the smaller ones). In other ways, however, the two types of entities differ to some substantial degree.

¹⁰³ The fact that one of the seven Regional Companies may or may not be more dispersed than GTE was at the time of the consent decree, *see* U S West Reply at 23 and supplemental Appendix 6, is therefore irrelevant.

¹⁰⁴ As indicated above, the decree in the Bell System case basically rests upon the twin pillars of (1) the divestiture of the Operating Companies from AT & T, and (2) the line of business restrictions on the divested companies. The GTE decree involves a different structure and different remedies.

Each of the Bell regional companies has a very strong, dominant position in local telecommunications in the area in which it serves; GTE's operations, by contrast, are widely scattered. Moreover, the Regional Holding Companies also have the facilities to provide all the intercity and inter-LATA traffic throughout their regions, while the GTE Operating Companies control little by way of intercity facilities, and what facilities they do have are by and large of the entrance type which do not cover the areas in which the companies operate. (Transcript of Hearing at 40-41). Finally, internal planning documents of GTE and Sprint indicate that Sprint's interexchange network will, even by 1985 or 1986, reach only sixteen GTE cities. (Transcript of Hearing at 42), and the Department of Justice has observed that of all access lines in existence, only one or two per cent are in GTE cities, and that Sprint has the fewest of these. (Transcript of Hearing at 41). All these factors suggest that entry by other interexchange carriers into the local markets dominated by GTE is far less likely and the anticompetitive effects of improper GTE actions will be both less probable and more easily detectable (footnotes omitted).

United States v. GTE Corp., 603 F.Supp. 730, 737 (D.D.C.1984). Nothing of significance has occurred since the GTE decree was entered to alter that assessment.

It is also worth noting that, when counsel for the Department of Justice appeared before the Court to defend the GTE settlement, he advised the Court that, should the Court believe that approval of that settlement might in any way cast doubt upon the appropriateness of the restrictions in the Bell System decree, the Department would prefer that the Court disapprove the GTE consent decree rather than to cast any shadow on the Bell System decree, particularly its line of business re-

strictions.¹⁰⁵ The Court approved the GTE decree on that basis.

4. *New Antitrust Actions*

The Department of Justice and several of the Regional Companies argue that the restrictions are unnecessary because, should the companies act in an anticompetitive manner, it would always be possible to remedy the situation by a new antitrust action.¹⁰⁶ The Department of Justice supports that contention, generally when other explanations fail.¹⁰⁷

The decree restrictions were to constitute a prophylactic measure, one that would prevent future antitrust violations and thus render new antitrust suits or similar actions unnecessary. *AT & T*, 552 F.Supp. at 150. It would be illogical or worse to destroy one of the two pillars of a decree that was adopted after an enormous litigation struggle lasting almost ten years, on the basis of the thin hope that, following the evaporation of the essential relief afforded at the conclusion of that struggle, the Department would bring a new antitrust action to start the cycle all over again.¹⁰⁸ In fact, the Depart-

¹⁰⁵ GTE Transcript of November 22, 1983 at 60-61.

¹⁰⁶ Department of Justice Report at 53; Response at 99, 123-24; *AT & T* Reply at 51.

¹⁰⁷ To cite a few representative examples, in discussing possible Regional Company joint ventures, the Department, rather than to analyze their anticompetitive potential in terms of the decree, states that they "would have to be analyzed in each instance under Section 7 of the Clayton Act or Section 1 of the Sherman Act" (Response at 99); in regard to an intervenor suggestion of *de facto* market division by the Regional Companies, the Department observes that any such division "would violate the Sherman Act and be dealt with accordingly" (Response at 120 n.235); and that, if the companies used Bellcore (*see pp. 558-59, infra*) as a vehicle for collusion "the government could take appropriate antitrust enforcement action" (Response at 123).

¹⁰⁸ The author of a book on the *AT & T* divestiture quotes Department of Justice attorneys as wondering whether the relationship

ment itself has in the past called the idea of enforcement through a new antitrust action "disingenuous." Department of Justice Reply to Responses to the Department's Proposals Regarding Section VIII-C Waivers, April 5, 1984 at 49.

E. *There Is Competition in the Markets*

It is not without significance that competition now exists in the interexchange market, and that the entry of the Regional Companies into that market is not necessary to give it vitality. To be sure, AT & T still retains the lion's share of that market, but there are now some 530 long distance carriers in the United States, eight of them serving twenty-five or more states. See Federal Communications Commission, Summary of Long Distance Carriers, at 2-3 (March 12, 1987); see also FCC Comments at 34-35 & n. 39. According to the Department of Justice, AT & T's rivals appear to be making sufficient progress that it would be at least premature to view the entry of the Regional Companies as necessary to preserve interexchange competition. Response at 45. The Court agrees with that assessment.

F. *Mobile Services*

The Department of Justice still recommends that the interexchange services restriction be lifted completely with respect to cellular radio, paging, and other mobile interexchange services. Response at 54-59. The basic reason given for this recommended modification is that mobile services constitute markets separate from land-line interexchange services,¹⁰⁹ and that, as the Depart-

between the federal government and the Bell companies is "to become a never-ending cycle of lawsuits, settlements, scandals, and resentments." Coll, *The Deal of the Century* at 230-31 (1986). See note 8, *supra*; see also Comments of Information Industry Association at 25 n.61.

¹⁰⁹ See *United States v. Western Electric Co.*, 578 F. Supp. 643, 650-51 (D.D.C. 1983).

ment puts it, everyone recognizes that, because of its higher price and limited capacity, cellular radio and other mobile services cannot be substitutes for the landline services, and that such services therefore constitute a separate market. Response at 55.¹¹⁰

The Department's analysis appears to be correct, at least as of now,¹¹¹ but that alone does not resolve the issue before the Court. On a purely literal level, interexchange cellular radio is an interexchange service as defined in section II(D)(1) of the decree. As such, it is of course prohibited to the Regional Companies absent developments that would cause the Court to find that, contrary to cellular radio's status at the time of the entry of the decree, its dynamics have changed to the point that there is no longer a substantial possibility that it could be used to impede competition. It cannot reasonably be claimed that such new developments have taken place.

More substantively, the entry of the Regional Companies into the cellular business without individualized scrutiny¹¹² would raise precisely the same concern that led to the adoption of the interexchange restriction in the first place: the possibility of discrimination against interexchange competitors in the provision of the access needed to reach the cellular customers.¹¹³ A number of develop-

¹¹⁰ As for paging, it is said that it cannot compete with landline interexchange service because in any event it operates only on a one-way basis.

¹¹¹ There are indications that the cost and the price of cellular radio are falling, and that in the future it may become competitive with landline interexchange services.

¹¹² Such scrutiny is now provided by the waiver request mechanism.

¹¹³ For that reason, the Department of Justice in 1983 took precisely the opposite position to that which it is taking now. Memorandum of the United States of May 19, 1983, at 18, although cellular radio then, even more than now, served a separate market.

ments contribute to the conclusion that such discrimination is not only possible but probable.

In the first place, several of the Regional Companies are not even willing to accede to the minimal Department of Justice recommendation that, should they be allowed into the interexchange market, they grant complete equal access to competing interexchange carriers, included in the intra-LATA portion of the cellular systems.¹¹⁴

Moreover, without even having been in the interexchange cellular business across the board, the Regional Companies appear to have engaged in acts of discrimination against other mobile services providers—activities that do not inspire confidence that, should the companies be permitted to enter the cellular market without limitation, they would treat competitors in an even-handed manner. According to the Huber Report itself—upon which the Department of Justice otherwise heavily relies—the Regional Companies have used their control over the local bottlenecks in a variety of ways to impede competition by providers of mobile service. Some of these anticompetitive activities are catalogued at pp. 580-81, *infra*.

There is also the broader concern that, should the motions be granted, a Regional Company could evade the basic interexchange services restriction itself by the simple expedient of constructing a connection between its mobile telecommunications switching offices and any of their standard end offices, thus providing long distance service throughout the country through a combination of cellular and standard interexchange facilities.

¹¹⁴ In response to the Department of Justice's equal access recommendation, one Regional Company observed that there was no "sound reason why Bell Atlantic should be required to provide equal access to inter-LATA calls completed within an area served by the same cellular switch." Bell Atlantic's Opposition to Conditions Specified in the Department's proposed Order, at 11.

Several of the Regional Companies, *see, e.g.*, U S West Memorandum at 159-60 & n. 171, reply on the grant by the Court of several waivers on a case-by-case basis with respect to the interexchange cellular services, contending that such waivers established the principle that the test of section VIII(C) has been satisfied. Not only is that contention entirely erroneous, but it exemplifies the attempts made from time to time by Regional Companies to take advantage of extremely limited precedents as bases for broad departures from the requirements of the decree.

Whenever the Court has granted waivers, it was essentially in the context of representations that highways and automobile traffic patterns (typically in large metropolitan areas) were such that the public benefits accruing from slight departures from the strict LATA boundaries to accommodate motorists with cellular phones were so substantial that they outweighed, on this limited basis, the dangers to fair competition. *AT & T*, 578 F.Supp. at 647-48; Memorandum of January 28, 1987 at 3. These waivers are not precedents for the broad relief the Regional Companies seek, and that relief, were it to be granted, would enable these companies to impede competition on a significant scale.

There is no basis under the decree for the removal of any of the restrictions on interexchange services, and the requests for such relief will be denied.

IV

Manufacturing

A. History

Section II(D)(2) of the decree, as amended by section VIII(A), prohibits the Regional Companies from manu-

facturing or providing telecommunications products or manufacturing customer premises equipment¹¹⁵ (CPE).¹¹⁶

In every significant respect, this restriction mirrors one of the other core restrictions, that on interexchange services: the manufacturing restriction, too, is based on voluminous trial evidence; the local monopoly is as central to the market here as it is to the interexchange services market; and the incentive and ability to act anti-competitively have not been significantly altered by the division of the Bell System into seven Regional Companies, by FCC regulation,¹¹⁷ or by any other factor. Indeed, in one respect the consequences of a removal of the manufacturing restriction would be even more visibly and directly counterproductive than a removal of the interexchange restriction: a flourishing, broad-based, innovative industry would be cut back to become one dominated by a small number of muscle-bound giants, possibly dominated by foreign conglomerates.

The manufacturing restriction¹¹⁸ was based in substantial part on evidence presented by the Department of Justice at the trial of this case indicating that the Bell

¹¹⁵ *AT & T*, 552 F. Supp. at 227.

¹¹⁶ CPE includes equipment employed on the premises of anyone other than a carrier that is utilized to originate, route, or terminate telecommunications. Section IV(E). It does not include equipment used "to multiplex, maintain, or terminate access lines." Section IV(N) defines telecommunications equipment as "equipment, other than [CPE], used by a carrier to provide telecommunications services."

¹¹⁷ No one reading the trial transcript could seriously refer, as does BellSouth, to "the long and successful history of FCC regulation of equipment network interfaces and related carrier practices." Response to Motion for Relief, at 11. See also note 202, *infra*.

¹¹⁸ The entire section II(D)(2) restriction, including that prohibiting the provision (*i.e.*, the marketing) of telecommunications products, will herein generally be referred to as the manufacturing restriction.

System had improperly monopolized the market for telecommunications equipment, in that its local Operating Companies purchased such equipment primarily from Western Electric Company, the System's manufacturing affiliate, and "engaged in systematic efforts to disadvantage outside suppliers." *AT & T*, 552 F.Supp. at 190-92. Further, the evidence suggested that, while the Bell System's anticompetitive activities in the long distance market were largely formulated by AT & T headquarters, the discriminatory procurement practices were primarily those of the local Operating Companies.¹¹⁹

Since the Bell System accounted for over eighty percent of the nation's central office switching and transmission equipment purchases,¹²⁰ only small fractions of the market remained open to independent manufacturers. Specifically, the Department alleged, and it appeared to the Court,¹²¹ that the local Operating Companies had engaged in three general types of anticompetitive conduct with regard to the telecommunications equipment and CPE markets.

First. As testimony and other evidence demonstrated, the Operating Companies managed, by one stratagem or other, to purchase Western Electric's products, even when those products were more expensive or of lesser quality than alternative goods available from unaffiliated vendors.¹²²

¹¹⁹ The evidence was somewhat in conflict on the question of the degree of direction given in that regard by AT & T headquarters.

¹²⁰ See Huber Report at 1.15.

¹²¹ See *AT & T*, 552 F. Supp. at 190; *AT & T*, 524 F. Supp. at 1371, 1374; see also Department of Justice Competitive Impact Statement at 15.

¹²² More specifically, the Court found, commenting on the government's evidence of anti-competitive conduct:

This evidence tended to show that the general trade manufacturers encountered a considerable number of obstacles in

Second. The Operating Companies and Bell Laboratories (the Bell System's central research and engineering affiliate)¹²³ engaged in discrimination in the dissemination of information and design by granting Western Electric premature and otherwise preferential access to necessary technical data, compatibility standards, and

trying to design equipment for, and to sell this equipment to, the Bell Operating Companies, and that these obstacles perpetuated a buy—Western bias. For example, the competitors had difficulty in locating the employee in Western or the Operating Companies authorized to negotiate a sale; in obtaining from Bell compatibility specifications (without which general trade products could not be designed for interconnection with the Bell network); and in persuading Bell Labs to complete objective evaluations (which were usually required before sales could be effected). The government's evidence further indicated that Bell did not authorize the purchase of the general trade equipment even if no Bell product of equivalent quality, cost, or technical sophistication was available; instead, crash programs were initiated to develop competing Western products (to the extent that, in one instance, Western literally copied the general trade product so that it did not need to wait for the design and development of its own model). Operating Company employees were under pressure from AT & T officials to buy from Western (even when a general trade product was cheaper or of better quality) or to wait until a Western product comparable to the desired general trade equipment was available, and they were required to provide detailed justifications for general trade purchases which were not necessary for the purchase of Western equipment.

The evidence supporting the seventeenth episode, the "umbrella" package, shows that, despite a stated policy to the effect that the Operating Companies were to buy the best quality equipment at the lowest price regardless of source, the structural relationship among the various components of the Bell System generated a pro-Western, or in-house bias in the Operating Companies' purchasing practices (footnotes omitted).

AT & T, 524 F. Supp. at 1371-72.

¹²³ Bell Laboratories is a scientific facility that has often been said to be without parallel anywhere in the quality of its scientific achievement.

other information about the Operating Companies' needs and requirements and the evolving characteristics of the local exchange. The delays encountered in these respects by Western Electric's competitors frequently made it difficult, if not impossible, for them to compete for Operating Company business: Western Electric was ready with the products when they were needed, and the competitors were ready several months later. The not unexpected result was a further skewing of procurement toward the Bell System's manufacturing arm and away from independents.

Third. The Bell System subsidized the prices of its equipment with the revenues from the Operating Companies' monopoly services.¹²⁴ The effect of this practice, as with respect to cross-subsidization generally, was (1) to permit the Bell System to undercut other producers of equipment (which lacked such a subsidy), and (2) unfairly to burden the consumers with excessive rates for the monopoly services they were furnished by the Operating Companies. These rates reflected not only the costs of

¹²⁴ The Court described this process in its 1981 Opinion as follows:

... [the government's] experts have testified that a combination of vertical integration and rate-of-return regulation has tended to generate decisions by the Operating Companies to purchase equipment produced by Western that is more expensive or of lesser quality than that manufactured by the general trade. The Operating Companies have taken these actions, it is said, because the existence of rate of return regulation removed from them the burden of such additional expense, for the extra cost could simply be absorbed into the rate base or expenses, allowing extra profits from the higher prices to flow upstream to Western rather than to its non-Bell competition. *See Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979); *Six Twenty-Nine Production v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966); 3 Areeda & Turner, *supra*, ¶ 726, p. 218 (footnote omitted).

AT & T, 524 F. Supp. at 1373.

those services but also the Bell System's need for funds for underselling the manufacturers and providers of non-monopoly products, *e.g.*, those engaged in the business of making or selling telecommunications equipment or CPE.

These various abuses should in theory have been discovered and corrected by federal and state regulators, but the evidence showed that, due to the size, power, and complexity of the Bell System and its Operating Companies compared to the small, inadequately staffed regulating bodies, this rarely occurred. *See* Part VI, *infra*. Moreover, when occasionally regulators did issue orders to halt improper activities, the Bell System routinely petitioned for reconsideration or rehearing, sought regulatory or judicial stays, played federal law and regulation against state law and regulation and vice versa, and in other ways delayed action until the regulators, more often than not, lost interest or gave up in frustration.¹²⁵

In approving the restriction on the manufacture of telecommunications equipment and CPE, the Court observed that such equipment, to be of practical use, had to be connected, directly or indirectly, to a local exchange.¹²⁶ The Court also concluded that there is a critical interdependence between telephone company equipment and CPE: the standards for one dictate the standards for the other. Since the Regional Companies were free to choose which equipment to locate in their central offices, they were able to dictate the standards to which the CPE had to be designed.

All these problems were exacerbated by the fact that, due to the monopoly power possessed by the Operating Companies in the exchange telecommunications and product market, they lacked the competitive restraints "that

¹²⁵ The legality of some of these Bell System actions was considered by the Court in the context of the *Noerr-Pennington* doctrine. *AT & T*, 524 F. Supp. 1361-64.

¹²⁶ *See also* MCI Response at 70.

ordinarily prevent the typical vertically-integrated company from engaging" in discrimination and cross-subsidization. On this basis, the "Operating Companies . . . would be able to pay inflated prices for poor quality equipment and to reflect these costs in their rates without suffering a diminution in revenues." *AT & T*, 552 F. Supp. at 190; *AT & T*, 524 F. Supp. at 1368-70. The Court therefore concluded that, inasmuch as there was no competition in the end product market, *i.e.*, exchange telecommunications, and the purchasing decisions of the Operating Companies were largely immunized from competitive pressures, widespread abuses became possible and, in a sense, almost inevitable.

Since the Regional Companies were to become the "heirs" of the Bell System with respect to ownership and control of the local Operating Companies and their facilities with the identical incentives and abilities as the Bell System in the telecommunications equipment market, the parties agreed on and the Court approved the manufacturing restriction on these companies embodied in section II(D)(2) of the decree. This, the Court decided, would ensure that purchasing and design discrimination and the consequent misallocation of costs would not be re-created. *AT & T*, 552 F. Supp. at 190-91.¹²⁷ And it also concluded that, if after the break-up the Regional Companies were permitted to manufacture CPE or telecommunications equipment or to market such equipment,¹²⁸ nonaffiliated

¹²⁷ The Court also found that the "minimal additional competition" that the Regional Companies could provide to an already competitive CPE market did not "outweigh the substantial possibility that [the Operating Companies] would engage in anticompetitive conduct." *Id.* at 191. See Subpart C, *infra*.

¹²⁸ The Court determined that the Regional Companies did not need to be restricted from providing, *i.e.*, marketing CPE, as distinguished from manufacturing it, because any risk of anticompetitive behavior in marketing was minimal due to the necessary

manufacturers would once again be disadvantaged and "the development of a competitive market would be frustrated." *Id.*

B. *Anticompetitive Activity is Probable*

In view of that relatively recent history, the question before the Court is whether a removal of the restriction is justified under section VIII(C) or whether such a removal would present a substantial risk that conditions of anticompetitive activity, concentration of the telecommunications equipment market in a few hands, monopolistic pricing, and a relatively sluggish pace of innovation, will return.

As will be seen *infra*, the short answer to the question about a renewal of anticompetitive activity here, as with respect to the interexchange restriction, is that no charges have occurred in the last three years that would warrant removal of the restriction on manufacturing: (1) the Regional Companies still have an ironclad hold on the local exchanges; (2) collectively they account for the purchases of what may be estimated at seventy percent of the national output of telecommunications equipment, only slightly less than the share of the pre-divestiture Bell System; (3) if the restriction were lifted, the Regional Companies may be expected to act as did the Bell System: they would buy all, or almost all of, of their equipment requirements from their own manufacturing units rather than from outsiders; (4) no measures, regulatory or otherwise, are available effectively to counteract such activi-

participation of independent manufacturers who were unlikely to be partners in an antitrust conspiracy. *AT & T*, 552 F. Supp. at 191. It also found that to allow the Regional Companies to market CPE manufactured by others could provide a meaningful balance against AT & T's dominance of the CPE market. *Id.* at 192. For these reasons among others, the Court required modification of the proposed decree to permit the Regional Companies to provide CPE. Section VIII(A).

ties; and (5) in short order following removal of the restriction, a return to the monopolistic, anticompetitive character of the telecommunications equipment market would be likely, if not inevitable. The Court will now elaborate on several of these conclusions.¹²⁹

The Department of Justice claims that technological and market changes, in addition to the existence of improved federal regulation, have rendered the manufacturing restriction unnecessary,¹³⁰ and in this assessment it is of course supported by the Regional Companies.¹³¹ These changes, it is said, eliminate any substantial risk that the Regional Companies could use their monopoly power in the various telecommunications equipment or CPE markets.¹³² That analysis is riddled with serious flaws.

First. The Department and the Regional Companies rely in substantial part on "the continued dispersal of equipment consumption, and the steady consolidation of equipment production," *e.g.*, Department of Justice Report at 161, stemming from the creation of the seven Regional Companies. On this basis, they claim that, because

¹²⁹ One of the issues, the impact of regulation, if any, is discussed in Part VI, *infra*.

¹³⁰ Department of Justice Report at 161-71.

¹³¹ See, *e.g.*, Ameritech Comments at 7-10, 32-41; U S West Comments at 32-34; Bell South Comments at 19-24; Southwestern Bell Comments at 54-60. The FCC, too, supports the removal of the manufacturing restrictions, as it does with respect to all the other restrictions, and as it did from the day they were entered as part of the judgment in this case. However, as will be seen below, another government agency, the NTIA of the Department of Commerce, expresses serious doubts on that score.

¹³² The Regional Companies have made no effort to show that any particular market to which they refer is a "relevant market or sub-market" for purposes of antitrust analysis or that they do not possess market power therein. See *Standard Oil Co. v. United States*, 337 U.S. 293, 299-300 n.5, 69 S.Ct. 1051, 1055 n.5, 93 L.Ed. 1371 (1949).

each company accounts for no more than a relatively small percentage of the purchases in any particular market, the purchasing decisions of one or several Regional Companies cannot have much impact on competition in the equipment market as a whole.

As explained above, on the most basic and literal level the existence of the seven Regional Companies is not a new development not contemplated when the decree was entered. Those who drafted, submitted, and approved the decree included the restriction on manufacturing at the same time as they provided, in the same decree, for the break-up of the Bell System into as many as twenty-two or as few as seven local units and hence into the correspond dispersal of purchasing power.¹³³ To make sense of the decree as a whole, therefore, it must necessarily be assumed that something more than the seven-fold division of the purchasing decisions is required to constitute the changed circumstances contemplated by section VIII(C) as a prerequisite to a removal of the manufacturing restriction.¹³⁴

It is true, of course, that any particular Regional Company does not, by itself, have a dominant share in the national equipment market. This does not vitiate the substantial possibility, however, that even on its own, such a company could use its monopoly power to engage in

¹³³ See Part III-C-1, *supra*.

¹³⁴ When it signed the decree, the Court found that, although the companies would thereafter be functioning independently, they would have the same incentives and abilities to discriminate in the same manner as when they were functioning under the auspices of the Bell System. *AT & T*, 552 F. Supp. at 190-92. The Court approved the manufacturing restriction presented by the parties precisely because of its conclusion that a substantial likelihood existed that, if permitted to manufacture telecommunications equipment, any one or all of the seven Regional Companies could and, considering the existing incentives would, disadvantage unaffiliated manufacturers and foreclose competition in substantial portions of the market.

anticompetitive conduct in the equipment markets, national or regional.

*The Department of Justice concedes that if the restriction were lifted, each of the Regional Companies would satisfy all or nearly all of its equipment needs from its own manufacturing affiliate.*¹³⁵ Dr. Huber estimates that exclusive in-house purchasing by any particular Regional Company will, depending upon the type of equipment, foreclose five to fifteen percent of the United States equipment market,¹³⁶ although with respect to some items of equipment that proportion may reach as high as twenty percent.¹³⁷

¹³⁵ Department of Justice Report at 169-70; *see* Huber Report at 14.13. The Department also speculates that, due to the high costs, risks, and economies of scale, it is more likely that Regional Company entry into production of central office switches would be as part of a joint venture with an existing central office switch manufacturer rather than on an individual basis. Department of Justice Report at 174-77; Response at 107. That may be correct, but it obviously does not support elimination of the restriction. *See* Subpart C, *infra*.

An investigation conducted by the New York Department of Public Service showed that New York Telephone, a subsidiary of NYNEX, made seventy-five percent of its purchases of office supplies, telephone circuit cable, and other such equipment from MECO, another NYNEX subsidiary. Initial Brief at 18. That experience is some indication of what would occur if the Regional Companies had the authority to manufacture telecommunications equipment and CPE.

¹³⁶ Huber Report at 1.15, 14.8, 14.13-14; *see also* Department of Justice Report at 169-70, 74-75. Although, depending upon the perspective, there may be four or more equipment submarkets, there is sufficient overlap between them that analytical flaws applicable to one type of equipment will not taint the conclusions with respect to the others. Comments of Tandy Corporation at 18.

¹³⁷ According to figures supplied by one Regional Company, the share of central office switch purchases in 1985 attributable to these companies was seventy-six percent (compared to the Bell System's 1981 purchases of eighty-one percent), and their share of wire cable purchases was seventy-one percent. U.S. West Appendix, Table 12, at A-3, A-4.

These figures are of course highly significant in and of themselves. Under the law, serious competitive concerns are raised even when relatively small market shares, for example as low as seven or eight percent, would be foreclosed as a result of leveraging of regulated monopolies into a related but unregulated market. See *Otter Tail Power Co. v. United States*, *supra*; *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980); *AT & T*, 524 F. Supp. at 1379 n.174; *International Tele. & Tel. Co. v. GTE Corp.*, 449 F. Supp. 1158, 1177-83 (D. Hawaii 1978). This leveraging doctrine serves antitrust interests by assuring that more efficient producers are not excluded from the market, and it prevents frustration of public regulation of subscriber rates.¹³⁸

Additionally, the cited figures actually fail to present the full measure of the anticompetitive situation since they focus entirely on national and even international markets. See, e.g., Department of Justice Report at 171-72 n.337, 173. To obtain a realistic picture, one must also evaluate the individual Regional Company power in their regional markets or submarkets. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25, 82 S.Ct. 1502, 1523-24, 8 L.Ed.2d 510 (1962). In their regions, these companies occupy positions of unquestionable domi-

¹³⁸ The Department of Justice espoused this doctrine throughout the pendency of the *AT & T* proceedings in this Court. See, e.g., Memorandum in Opposition to Defendants' Motion for Involuntary Dismissal, pp. 72-80, 363; Pretrial Brief for the United States, pp. 48-54, 57-60; Competitive Impact Statement at 9; Reply dated April 5, 1984 regarding section VIII(C) waivers, pp. 7, 14-16. Now, inexplicably, the Department states that antitrust concerns are not raised when monopolies are leveraged into a substantial portion of the equipment manufacturing market. Department of Justice Report at 162, 166, 176. No reason is furnished for this change in analysis.

nance,¹³⁹ and substantial anticompetitive effects would be felt in these regional markets if the manufacturing restriction were lifted.¹⁴⁰

Suggestions have been made that, at least with respect to some items of equipment, not all Regional Companies would purchase it from their own affiliates. Not only is any such assumption contradicted by the Department of Justice and Huber reports,¹⁴¹ but experience since divesti-

¹³⁹ Only large central office switches require economies of scale greater than those allowable in one Regional Company area. Huber Report at 16.16-17.

¹⁴⁰ For example, Dr. Huber has concluded that elimination of the restriction would permit the Regional Companies to keep critical design information from non-affiliated manufacturers. Huber Report at 14.13, 14.20, 16.15, 16.19. Another conceivable course of conduct by the Regional Companies that could have an anticompetitive impact involves the provision of voice-data services that use the local loop simultaneously for voice conversations, data transmission, and other related services. In order for the local loop to be used in that manner, an electronic device is required on each end of the loop. See IDCMA Comments at 20-22. If each Regional Company had approximately nineteen million access lines, Huber Report at Table G.4, and each electronic device cost \$300 per line, then each such company could control approximately a \$6 billion equipment market within its own region. Translating this statistic to a national focus, more than a \$40 billion market could be foreclosed to competition. "Such a development would be the death knell for domestic data communications equipment manufacturers." See IDCMA Comments at 20-21.

¹⁴¹ See note 135, *supra*. The Huber Report goes on to say (at 14.16-17):

A much more plausible scenario would have the RHC entering into a joint venture with one of the established domestic or foreign manufacturers and then using its own captive affiliate to provide a protected sales base from which to attack national and international markets. Most foreign manufacturers are virtually guaranteed profitability in their home markets, by subsidies or captive sales at inflated transfer prices. For them, anything earned in the United States is a windfall. Indeed, many of these manufacturers claim to be aiming for about a 5 to 10 percent share of the U.S. market, which equates to about

ture has been that Regional Companies have entered markets, many entirely foreign to telecommunications, just as quickly as they were legally free to do so by judicial construction, waiver, or otherwise, and occasionally even when they were not legally free to do so. It would be entirely unrealistic to assume that these companies would hereafter fundamentally reverse their pattern of behavior and refrain from entry into the telecommunications and CPE businesses that are allied to enterprises in which these companies are already engaged and that are potentially fertile sources of cross-subsidy skim-offs.

The companies may also be expected to be motivated to enter these markets by the dynamics of the relations among them and the imperatives of the marketplace. Their corporate images will not tolerate their abstention, and a Regional Company that opted out may be found by shareholders and others to have passed up a profitable extension into an adjacent market.¹⁴²

In any event, as explained above, section VIII(C) of the decree prohibits the lifting of a line of business restriction if a Regional Company merely "could" impede competition in the market it seeks permission to enter; it does not charge the Court with finding that such a company "would" do so. In law, under section VIII(C), and in experience on the basis of Regional Company behavior to date, it is reasonable to assume that all the Regional Companies would enter the manufacturing market; that they would satisfy all or nearly all of their equipment needs from their own manufacturing subsidiaries; and that they would thus foreclose on an aver-

one RBOC's purchases. Of course, under any requirements contract between a foreign manufacturer and an RBOC, the affiliates would be fairly free to customize switches, develop idiosyncratic standards, and then charge specialty transfer prices for the specialty product provided.

¹⁴² See Comments of North American Telecommunications Association at 11-18.

age some seventy percent or more of the various equipment markets.¹⁴³ This would of course constitute an enormous step back to the pre-divestiture situation.¹⁴⁴

In addition, Regional Company conduct taken in response to its incentive to purchase equipment from its own affiliate or joint venture partner (*see* Subpart C, *infra*), would tend to create a balkanized, ideosyncratic equipment market in which each manufacturer would sell primarily to the Regional Company with which it was affiliated—a development that would even further shrink, and shrink drastically, the size of the equipment market that was not simply parasitical.¹⁴⁵

C. *Joint Regional Company Actions*

These threats to competition would be further aggravated if the Regional Companies acted in concert with respect to manufacturing and purchasing. There has been no showing nor even plausible speculation that the companies could not or would not act in combination (1) by entering into explicit or implicit agreements with each other regarding specifications or interconnection requirements, or (2) by disadvantaging unaffiliated manu-

¹⁴³ Assuming a conservative ten percent share of the national market per Regional Company.

¹⁴⁴ The Court does not agree with the implication of suggestions, such as those advanced by Ameritech, that, because the Regional Companies purchased about eighty percent of the metal cable sold to telephone companies, this was “only a part of the total market for metal cable” and purchasing power was therefore dispersed. Comments at 35 n.27.

¹⁴⁵ This need not occur immediately. As has been pointed out, it is self-evident that, over time, each of the Regional Companies will not forego the opportunities to confer competitive advantages on its “house” brand of CPE, and manufacturers will soon learn that it is more profitable and less troublesome to affiliate with a Regional Company rather than to attempt to market CPE on a nationwide basis. Opposition of North American Telecommunications Association at 9.

facturers by making use of their participation in Bellcore.¹⁴⁶

It is argued that the Regional Companies are more likely to compete fiercely with each other for the procurement business than to act jointly and in combination. It will no doubt occur to some or all of these companies, however, that each of them would benefit financially if it could manufacture for sale and sell in its own region, all of its manufacturing output, without fear of the only formidable competition—another Regional Company—and thus possess an enormous captive market.¹⁴⁷ Cut-throat competition by all against all in all the regions would not look nearly as attractive from an economic point of view.

It has also been suggested that collusion through the Bellcore connection could be prevented by limiting Bellcore's permitted range of activities. Department of Justice Report at 178. That argument, too, looks far more palatable in concept than it does when the necessary details of implementation are examined. No proponent of the Bellcore-limitation approach has suggested, either generally or specifically, how that entity's activities should or could be limited.¹⁴⁸ The reason for that reticence is simple.

Bellcore has responsibility under the decree to prevent the technical fragmentation and hence the deterioration

¹⁴⁶ Bellcore was originally known as the Central Staff Organization. *Western Electric Co.*, 569 F. Supp. at 1113-18. For an explanation of the Bellcore functions, see below. For some reason, the Department of Justice did not analyze the competitive effect of joint Regional Company purchasing decisionmaking, although it does concede that Bellcore could function to disadvantage the Regional Companies' competitors. Response at 124.

¹⁴⁷ See note 140, *supra*.

¹⁴⁸ The Department of Justice relies on its old standby for situations presenting no answer consistent with its position—the possibility of a new antitrust action. Response at 124. See note 107, *supra*.

of the national telephone network; to perform the technical and engineering responsibilities that must be performed on a centralized basis if there is to be a single functioning system; to set the technical and performance standards for network equipment; and to act as a central liaison between the civilian telephone system and the military's and other emergency functions. *AT & T*, 552 F.Supp. at 208-09; *Western Electric Co.*, 569 F.Supp. at 1114-18. To decentralize or otherwise to limit the responsibilities of Bellcore so as to prevent its use as a vehicle for anticompetitive action by the Regional Companies would inevitably fragment and frustrate Bellcore's centralizing responsibilities which, notwithstanding the divestiture, permit the nation's telecommunications systems to continue to function on the basis of one national network with one national quality standard. It would also undermine Bellcore's ability to act as the critical link between the civilian telephone systems and the national defense communications networks.¹⁴⁹

The Bellcore problem thus resembles the squaring of the circle. If Bellcore's powers are cut back to safeguard against Regional Company collusion in manufacturing, marketing, and purchasing, it will be deprived of the capacity to perform its national coordinating and standard-setting functions; if its powers are left intact, it will stand as a suitable vehicle for joint Regional Company action with respect to the manufacture of telecommunications equipment and CPE.

D. *Effect of Removal on Innovation*

Not only is there no basis for concluding that the conditions that caused the establishment of the manufacturing restriction in the decree have ceased to exist, but the removal of that restriction at this juncture would arrest or nullify significant positive developments that have occurred since then.

¹⁴⁹ *Western Electric Co.*, 569 F. Supp. at 1113-15.

As discussed above, it cannot be seriously disputed that the Regional Companies' local exchanges continue to be monopolies; that a Regional Company that was permitted to enter manufacturing would satisfy its equipment needs exclusively or primarily from its own affiliate; and that such activities would contravene the very purpose of the decree—to prevent leveraging of Regional Company local exchange monopolies so as to foreclose independent manufacturers from a very substantial part of the telecommunications market. For these reasons, retention of the manufacturing restriction is supported by consumers,¹⁵⁰ interexchange carriers,¹⁵¹ independent local exchange carriers,¹⁵² cellular carriers,¹⁵³ manufacturers, suppliers, and services,¹⁵⁴ labor unions,¹⁵⁵ and state regulators.¹⁵⁶

The Regional Companies argue in response that the negatives, both in regard to substance and to opinion in the marketplace of ideas, are outweighed by the fact that research, innovation, development of new products, and improvements in quality assurance would be inhibited

¹⁵⁰ *E.g.*, Consumer Federation of America Comments at 2, 36-40; Ad Hoc Telecommunications Users Committee Comments at 11-12; International Communications Association Comments at 11-12.

¹⁵¹ General Electric Communications and Services Comments at 30-33; MCI Response at 70-79.

¹⁵² United Telecommunications Comments at 24-25; Taconic Telephone Corporation Comments at 14-17.

¹⁵³ McCaw Communications Comments at 17-19.

¹⁵⁴ Electronic Industries Association Comments at 18-22; North American Telecommunications Association Comments at 7-42; IDCMA Comments at 14-62; United States Telecommunications Suppliers Associations Comments at 17-53; Tandy Corporation Comments at 10-30; CBEMA Comments at 29-33.

¹⁵⁵ Communication Workers of America Comments, Appendix at 6-9.

¹⁵⁶ Public Service Commission of the District of Columbia Comments at 27-29, 36-38; Kentucky Public Service Commission Comments at 23-25, 28.

unless they are permitted to participate in the various aspects of the manufacturing cycle.¹⁵⁷ One problem with that argument is that it precisely mirrors the points advanced by the Bell System at the trial of this case—that the efficiencies of integration outweigh such independent competition as might occur as a consequence of freer entry into the market, and that research and development would wither if the Bell System were broken up—and that were squarely rejected by the decree, as they had to be on these facts under the antitrust laws.¹⁵⁸ Almost by definition, these same arguments cannot qualify as changes cognizable under section VIII(C).

Another, equally compelling answer is that the Regional Company argument has already been proved to be factually wrong: there has been a flowering of research, development, innovation, introduction of new products, and quality assurance; new firms have entered the market; prices of equipment have declined dramatically¹⁵⁹ (according to some by as much as fifty percent in some categories);¹⁶⁰ and competition flourishes in a market that had seen relatively little of it before. The equipment market now consists of some six or eight very large firms, one to two hundred medium-sized firms, and hundreds of still smaller, vigorous, and inventive firms,¹⁶¹ some of

¹⁵⁷ See, e.g., NYNEX Comments at 43-47; BellSouth Comments at 22-23; Ameritech Comments at 36-40; Southwestern Bell Comments at 55; U S West Comments at 33-34.

¹⁵⁸ Vertical integration is not unlawful as such; but it can be anticompetitive under certain circumstances where there is a mix of regulated and unregulated operations. *AT & T*, 524 F. Supp. at 1369, 1373.

¹⁵⁹ Department of Justice Report at 162-63, 171-73.

¹⁶⁰ U.S. Telecommunications Suppliers Association at 12-13.

¹⁶¹ Salomon Brothers, Stock Research on Telecommunications Equipment, the United States Market, at 11 (Feb. 1987); Electronic Industry Association at 2.

them in profitable relationships with one or more of the Regional Companies.¹⁶²

If the restriction were removed, there would be a serious risk of a return to conditions of anticompetitive activity, concentration of the telecommunications equipment market in few hands, monopolistic pricing, and a relatively sluggish pace of innovation. According to a distinguished outside observer, the Regional Companies would then become "central vigorous players in the equipment market, buying many of the smaller [firms], integrating services and equipment sales, and developing into seven smaller versions of what once was AT & T."¹⁶³

Certainly the emergence since entry of the decree of a dispersed equipment market characterized to an unprecedented extent by innovation¹⁶⁴ is proof that the fruitful competition the decree sought to establish is here. If this nation is serious about the need for competing effectively with ever more ingenious foreign producers, especially in a high technology market such as telecommunications, the sources of invention and innovation represented by competition and by competitors that do

¹⁶² One Regional Company argues that the restriction "'quarantine[s] the unique capabilities and knowledge the [companies] gain from designing, operating, and maintaining the local network.'" U S West Memorandum at 87 (quoting Stantel Telecommunications Comments at 24). Not only does this argument simply repeat points made over and over during the trial by the Bell System with singular lack of success, but it is also factually erroneous. The restriction merely prevents the Regional Companies from once again exploiting knowledge gained by virtue of their privileged monopoly franchises for their sole benefit and for anticompetitive purposes; it does not prevent that knowledge from being disseminated among and used by manufacturers for the benefit of the telecommunications system, the industry, and the public.

¹⁶³ Salomon Brothers, Stock Research on Telecommunications Equipment, *supra*, at 11 (Feb. 1987).

¹⁶⁴ See note 330, *infra*.

not rely on fixed rates of return as the principal source of their income must not be shut off.

In any event, insofar as this Court's obligations under the antitrust laws and under the decree are concerned, it is not prepared to halt the progress that has been made by independent manufacturers and sellers, large and small, toward a genuinely competitive environment in the telecommunications equipment market, by modifying the decree so as to turn back the clock toward domination of the market by the Bell monopolists.

E. *Foreign-Dominated Firms Crowding Out Specialized Manufacturers*

The Regional Companies finally contend that such factors as the economies of scale involved in manufacturing, the increasing standardization of interconnection requirements, and the vigor of the existing competition will prevent them from becoming regional monopolists should they be allowed into the manufacturing market. That contention, too, lacks merit.

In the first place, several of the assumptions underlying this contention are not correct. For example, although economies of scale apply to some types of equipment, they do not to others. Likewise, the trend in interconnection requirements for such items as data communications equipment has actually been toward less uniformity.¹⁶⁵

Beyond that, while the competitive nature of the equipment manufacturing business depends to an extent upon the type of market that is at issue, the fact that competi-

¹⁶⁵ While economies of scale are present in central office switch manufacturing, they are not in the data communications equipment industry. Compare IDCMA Comments at 30 with Department of Justice Report at 171-76 and Huber Report at 14.14. The trend in interconnection requirements has been toward less uniformity with respect to data communications equipment. IDCMA Comments at 42-43.

tion is presently healthy and strong in many markets does not diminish the ability of the Regional Companies to leverage their monopoly power should they be allowed into manufacturing.

The Department of Justice acknowledges that removal of the restriction will be followed by the displacement of many of the competitors, postulating that increasing concentration in the equipment markets is inevitable. Report at 171-76. However, trends with respect at least to some types of equipment have been precisely in the opposite direction, and whatever inevitability there is to greater concentration would flow primarily from the effects of the removal of the restrictions. See pp. 561-62, *infra*. The Department's position contemplates, with what may only be characterized as remarkable equanimity for an antitrust enforcement agency, the ready destruction of many high-quality firms producing high-quality goods that have emerged since divestiture, and that are performing important service to the economy. Indeed, according to another government agency, the Commerce Department's NTIA, the most innovative and efficient American businesses are rarely the largest or the most highly integrated but smaller, specialized firms.¹⁶⁶ NTIA Trade Report: *Assessing the Effects of Changing the AT & T Antitrust Consent Decree* at 17-18 (February 4, 1987).¹⁶⁷

¹⁶⁶ The manufacture of some products, such as data transmission equipment, including modems, digital data sets, multiplexers, and network management systems, is today highly decentralized, involving many small firms.

¹⁶⁷ NTIA goes on to comment that "It is no secret that large U.S. corporations have not always proven successful when confronted with aggressive foreign-based . . . competition . . . [F]irms such as AT & T . . . did not quickly develop the ability to function in competitive markets because for years the company did not need to, and devoted its resources to satisfying 'captive' Bell System requirements." NTIA Trade Report at 17-18.

Moreover, the Department of Justice lack of concern regarding concentration ignores the effect such concentration will have on the survival of competition itself in several equipment markets, and the threat that will be posed by the ensuing manufacturing monopoly or oligopoly involving foreign firms. According to NTIA, the most plausible scenario in at least one telecommunications market is that, in the event of a removal of the decree restriction on manufacturing, the Regional Companies will join forces with mammoth manufacturing empires,¹⁶⁸ most likely foreign,¹⁶⁹ and that this will pose a substantial risk of destruction of the United States central office equipment manufacturing industry. NTIA Trade Report at 125-26.¹⁷⁰

These predictions are plausible. Dr. Huber's survey has found that affiliations between central office switch manufacturers and telephone service companies have tended to develop around the world wherever structural restraints are absent. Huber Report at 14.21-23. This is not surprising. Manufacturers have strong incentives to seek market share "guarantees" in the form of an affiliation with large exchange service providers such as the Regional Companies; and these companies, in turn are attracted by the acquisition of expertise and, more importantly, the minimization of risk embodied in partnerships with huge manufacturers with ample capital.

Because of their size, capital, and assured source of income from the ratepayer-supported telephone affiliates of the Regional Companies, these international giants will have the market power to adjust price almost at

¹⁶⁸ NTIA Trade Report, *Assessing the Effects of Changing the AT & T Antitrust Consent Decree* at vi (February 4, 1987).

¹⁶⁹ Notably, one of the few intervenors to support removal of the restriction is Stantel Telecommunications, Inc., the U.S. subsidiary of Great Britain's Standard Telephone and Cable plc. Comments at 2.

¹⁷⁰ See also Huber Report at 1.16, 1.17, 14.25.

will to achieve market share, to the inevitable detriment of independent domestic producers. In short, the effect of the Justice Department's scenario is likely to be the displacement of small, efficient American firms by a few huge syndicates composed of foreign company and Regional Company components whose survival and domination in this environment will have been achieved by factors unrelated to efficiency or quality of performance.

Among its many other undesirable consequences, such a development would further reduce competition in this country, if only because the combination of foreign capital and the Regional Company monopoly position¹⁷¹ with a captive market amounting to some seventy percent of the total market will prove fatal to whatever independent or smaller producers still survived. Another likely consequence would be a strong detrimental effect on the international competitiveness of the American telecommunications industry and the employment opportunities of American workers. NTIA Trade Report at 108-09.

In sum, not only has no change occurred in telecommunications and CPE manufacturing since 1982 that would justify the removal of the restriction under the section VIII(C) standard, but the opposite is true: a removal of the restriction would be likely to extinguish or substantially curtail the healthy competitive domestic market that has emerged in the last three years. There is no justification for removing the manufacturing restriction, and the requests for such removal will be denied.

V

Information Services

Section II(D) (1) of the decree prohibits the Regional Companies from providing "information services." AT

¹⁷¹ The eagerness of the Regional Companies to combine with foreign manufacturers is exemplified by BellSouth's passionate argument in favor of such ventures. Response to Comments at 39-40.

& T, 552 F.Supp. at 227.¹⁷² An information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications." *AT & T*, 552 F.Supp. at 229.¹⁷³

While the decisions on interexchange services (Part III) and on manufacturing (Part IV) are not particularly difficult, because no persuasive case has been or can be made that the particular restrictions are eligible on any reasonable basis for removal under section VIII(C) of the decree, the problem is more difficult with respect to the information services restriction which is discussed here and in Part VIII, *infra*.

If the Court were to consider only the request of the Regional Companies and of the Department of Justice for a complete removal of the restriction on the provision of information services, without distinction between content and transmission, that decision, too, would plainly have to be in the negative, for the information services restriction is supported by the same factors that require retention of the interexchange and manufacturing prohibitions.

As the Court stated in the 1982 Opinion explaining the provisions of the decree:

All information services are provided directly via the telecommunications network. The Operating

¹⁷² A somewhat related provision, section VIII(D) of the decree, prohibits *AT & T* from providing electronic publishing, a type of information service, for a period of seven years from the date of entry of the decree. *AT & T*, 552 F. Supp. at 231.

¹⁷³ The Department of Justice claims to have some difficulty in distinguishing between exchange services and information services. Report at 106, 116. This claim is somewhat puzzling, for it was the Department that made the distinction when it drafted the decree.

Companies would therefore have the same incentives and the same abilities to discriminate against competing information service providers that they would have with respect to competing interexchange carriers. Here, too, the Operating Companies could discriminate by providing more favorable access to the local network for their own information services than to the information services provided by competitors, and here, too, they would be able to subsidize the prices of their services with revenues from the local exchange monopoly.

AT & T, 552 F.Supp. at 189 (footnote omitted).

The Court went on to say at the time that, if the Operating Companies were excluded from the information services market, they would have an incentive to design their networks to accommodate the maximum number of information service providers on account of the earnings they could expect to receive from these providers in terms of access fees. On the other hand, if these companies were permitted to provide their own information services, their incentive would be "to design their local networks to discourage competitors, and thus to thwart the development of a healthy, competitive market." *AT & T*, 552 F.Supp. at 189-90 (footnote omitted).

Based upon these considerations, the Court has consistently upheld the restriction as incorporated in the proposed consent decree submitted by the parties. Thus, it explicitly rejected the suggestion, made early on, that the Regional Companies could "most efficiently provide information services by taking advantage of various economies," for example by the use of the same equipment for exchange telecommunications and information services. *AT & T*, 552 F.Supp. at 189 n. 238. The Court concluded that it would be impossible to determine whether such an advantage was due to inherent efficiencies or to efficiencies resulting from the deliberate design

of the network in a discriminatory fashion. *Id.*¹⁷⁴ Similarly, in response to a 1984 request by the Regional Companies for a waiver of the line of business restrictions in section II(D)(1) of the decree, the Court reaffirmed that removal of the information services restriction would have to await "significant technological or structural changes" that would substantially reduce the dependence of information service providers on the local exchange networks. *AT & T*, 592 F.Supp. at 868. And the Court found that, as of that time, no such changes had occurred.¹⁷⁵

A. *The Regional Company Bottlenecks*

There still has been no significant, relevant change in the situation. As discussed in Part II-B, *supra*, the Regional Companies continue to possess bottleneck control over the local exchange facilities, and these are the facilities upon which competitive information providers, like the Regional Companies' competitors in the inter-exchange and the manufacturing markets, depend.¹⁷⁶ As then Assistant Attorney General Douglas J. Ginsburg

¹⁷⁴ As explained above, network design is never complete; particularly where as dynamic a market as that for information services is involved, redesigns are not merely optional, they are often mandatory.

¹⁷⁵ While competition in the various information services markets has substantially increased, *see* Part VIII, *infra*, these services vary widely with respect to concentration and ease of entry. Some markets, such as those for telephone answering services, public announcement services, and alarm monitoring, for example, are easy to enter and, in most geographic areas, unconcentrated. Others, including legal database access and retrieval, and transaction processing, are more highly concentrated. Department of Justice Report at 112; Huber Report at 6.50-6.51, 6.15-6.16, 7, 8, 10, 12-13.

¹⁷⁶ *See generally* Analysis dated May 19, 1987, by Dr. Lee L. Selwyn and W. Page Montgomery on behalf of Teconomics and Technology, Inc., attached to the Reply of the Ad Hoc Telecommunications Users Committee.

stated in a September 19, 1985 letter, to John D. Dingell, Chairman of the House Committee on Energy and Commerce, at pp. 5-6:

[t]he Decree's basic restrictions on the BOC's ability to provide information services are based on the BOCs' control of access to telephone customers through the local exchange network . . . should conditions change to the degree that the BOCs no longer possess bottleneck monopolies over the local networks, it would be appropriate to consider removal of the information services restriction.

Competition in the local exchange markets is foreclosed now as it was then, because of the economic infeasibility of alternate local distribution technologies on a substantial scale. To be sure, information services can bypass the local monopoly bottlenecks controlled by the Regional Companies to a slightly greater extent than can inter-exchange services. However, as will now be seen, the various additional bypass technologies do not provide meaningful channels to the information service providers who, by the very nature of their business, must seek to reach large, dispersed audiences over reasonably priced, interactive facilities. NTIA, *Competition in the Local Exchange Telephone Services Market* at 29.

Thus, the physical transport of media through computer disks or CD-ROMS¹⁷⁷ is not comparable in functionality to on-line database services. The CD-ROMS are essentially storage mediums; they do not provide transactional capabilities, and they have largely fixed user costs. Another possible alternative, satellite transmission, is unsuitable for all except possibly some of the very largest users because (1) the general public itself could not be reached by way of satellite communications but only the Regional Companies' own facilities, and (2) satellite transmission is used efficiently primarily for a

¹⁷⁷ CD-ROM stands for compact-disk read-only memory.

continuous, high volume stream of one-way data.¹⁷⁸ And while cable networks are not dependent for transmission on the local exchange network, they do depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space.¹⁷⁹ In any event, regardless of the nature and scope of cable dependence on local exchange facilities, ubiquitous cable networks have yet to be developed,¹⁸⁰ and cable, too, generally provides only one-way data.

In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks, and the information service providers remain as dependent upon those facilities, and those who control them, as they did in 1984 and as interexchange providers do at the present time.

Dr. Huber, the Department of Justice's expert, not only recognizes this conclusion throughout his report,¹⁸¹ as does the NTIA,¹⁸² but he correctly emphasizes that,

¹⁷⁸ See Huber Report at 6.20-6.21.

¹⁷⁹ Warner Cable Communications Comments at 12-14; *see also* National Cable Television Association Comments at 28-34.

¹⁸⁰ Warner Cable Communications Comments at 15.

¹⁸¹ Although on the topic of information services, as on other topics, Dr. Huber endorses the general Department of Justice positions, the facts he reports on not infrequently support conclusions at variance with those positions.

¹⁸² A technical analysis performed by NTIA likewise makes clear that the characteristics of alternatives relied on by the Department of Justice are incompatible with the needs of most information services: (1) private microwave systems require unobstructed line-of-sight transmission paths, and typical cost per small system is \$12,000 to \$38,000; (2) as to fiber optic systems, only thirty-three users of local fiber systems have been cited, targeted customers use either 24 or 672 voice grade equivalent channels, and primary use is for interexchange access or private networks; (3) only a small number of cable television systems have the costly equipment needed for

because of their very nature, information services are especially vulnerable even to slight manipulation and discrimination, as they are also to small degradations in transmission quality. For that reason, he correctly concludes that the various examples of non-access-dependent services cited by the Department of Justice are not real substitutes, especially for "time-sensitive information services, [whose] competitive health . . . depends strongly on continuing non-discriminatory access to [Regional Company] ¹⁸³ services and facilities." Report at 6.23. In another section in his report, he notes that

[c]ompetition among database providers and electronic publishers is critically dependent on reliable fast delivery at a reasonable cost. The telephone network provides a critical link between many providers and their customers. The possibility of [Regional Company] entry into these information markets therefore raises the familiar concerns about the possibility of discriminatory access to [Regional Company] facilities.

Report at 7.7.

Again, according to Dr. Huber, the national value added networks "depend heavily on the [Regional Companies] to provide transparent access to end user's data

two-way operations; (4) cellular radio systems are not generally appropriate for nonmobile service; costs make cellular service undesirable as a substitute for local service at this time; and long talking times could degrade service quality; (5) cost of digital termination systems may be higher than for microwave systems, over \$7,850 per voice channel according to Bell Communications Research; and (6) satellite systems are most cost-effective for high traffic volume, long haul (greater than 200 miles) applications, and cost per voice channel is as high as \$2,000. NTIA, *Competition in the Local Exchange Telephone Services Market* at 29, 30-34, 37-38.

¹⁸³ The Huber Report generally uses the broader term "LEC," but as indicated *supra*, the vast majority of local exchanges companies are Regional Company exchanges and, in any event, for purposes of this analysis, there is no relevant distinction.

traffic." Report at 5.13. In sum, while in his view new transport technologies are "on the horizon, the [Regional Company] still provides critical links in the transport pyramid." Report at 7.15.¹⁸⁴

B. *Incentive and Ability to Discriminate*

It is necessary next to determine whether, with respect to the provision of information services, the incentive and ability of the Regional Companies to engage in anti-competitive conduct remains the same as it was when the decree was entered. The answer is plain. There has been no change whatever in this respect since 1984, and no demonstration that now, unlike then, there is no substantial possibility that the Regional Companies could not, and indeed would not, use their monopoly power to impede competition in the information services market.

The Regional Companies argue at some length that they have no incentive to discriminate against competitors in the information service market because to do so would diminish use of the network and hence a reduction in their revenues.¹⁸⁵ But in any market where the Regional Companies are in competition with independent information service providers, their economic interest lies in manipulating the system toward use of their own services, rather than in encouraging maximum use of the network by their information service competitors. Only ten to twenty percent of the total cost of an information service is accounted for by Regional Company usage costs, Huber Report at 6.29, and a Regional Company would

¹⁸⁴ Additionally, under the FCC's *Computer III* order, the Regional Companies may install information services equipment in their central offices, but their competitors must locate comparable equipment elsewhere, where, as General Electric Communications and Services Company emphasizes, Opposition at 23, their more expensive interconnections can be subject to delay and other manipulation.

¹⁸⁵ NYNEX Response at 32-33; U S West Memorandum at 42.

therefore earn far more from a customer base through use of its own information service than it would through network usage by calls made by and to its information service competitors.

That the ability for abuse exists as does the incentive, of that there can also be no doubt. As stated above, information services are fragile, and because of their fragility, time-sensitivity, and their negative reaction to even small degradations in transmission quality and speed, they are most easily subject to destruction by those who control their transmission. Among the more obvious means of anticompetitive action in this regard are increases in the rates for those switched and private line services upon which Regional Company competitors depend while lower rates are maintained for Regional Company network services; manipulation of the quality of access lines; impairment of the speed, quality, and efficiency of dedicated private lines used by competitors; development of new information services to take advantage of planned, but not yet publicly known, changes in the underlying network; and use for Regional Company benefit of the knowledge of the design, nature, geographic coverage, and traffic patterns of competitive information service providers.¹⁸⁶

Dr. Huber, too, has recognized that the Regional Companies are able to discriminate in the provision, maintenance, and restoration of private lines, access or timing of new basic transmission services, and misuse of customer and competitor information, Report at 7.10, and furthermore that costs can be shifted to regulated business on a large scale.¹⁸⁷ Huber Report at 12.16, 11.18,

¹⁸⁶ See Comments of ADAPSO at 21-28; Opposition of General Electric Communications and Services at 21.

¹⁸⁷ That report notes at 7.15 that "[c]ross-subsidy is possible for some major cost categories"; at 8.12, that the "[Regional Companies] retain a very strong hold on [information service provider] access to [Public Announcement Services] customers through 976

10.23, 13.11, 9.9, 8.12, 7.15; *see also* Comments of Information Industry Association at 13-15.

Even now, when the opportunity for improper activity by the Regional Companies is minimal compared to what it would be if the restriction were lifted, danger signals have begun to appear. For example, Dun & Bradstreet complains that in the Yellow Pages directory market BellSouth is duplicating the Bell System pattern of refusals to deal with competitors, protests of willingness to do so being followed by bad faith negotiation, and further delay. That particular dispute appears to be pending in the courts. Comments at 35-36 n. 15.

Similarly, Metscan, an automatic meter reading and monitoring system, claims to have been treated with respect to its connecting jacks just as the Bell System treated equipment competitors—delays, excessive charges, and difficulties in achieving satisfactory access of necessarily interconnection devices. Comments at 7-8.

To the extent that it is possible for them to do so, the Regional Companies may even now be engaged also in improper cross-subsidization. For example, a study undertaken by the staff of the California Public Utilities Commission of Pacific Bell's relationships with its affiliates found evidence that: (1) Pacific Bell and its rate-

services"; at 10.21, that "[i]f the BOCs were allowed to enter the market for [Voice Storage and Retrieval] service, they might be able to compete unfairly by shifting the costs of unregulated VSR service into their regulated accounts, thus reducing their apparent costs of providing service"; at 11.18, that "[i]f a BOC offered electronic mail service, about 70 percent of the costs of the service bureau would be potentially shiftable to the BOC's regulated accounts"; at 12.7, "[i]f the BOCs were allowed to enter the transactions processing market, they would have an incentive to hinder their competitors in that market by denying them access to inputs over which the BOCs had control"; at 12.16, "substantial potential for cross-subsidy appears to exist"; and at 13.11, "the [Regional Company] still provides critical links for alarm providers".

payers were not adequately compensated for the loan or transfer of skilled personnel to unregulated operations; (2) Pacific Bell provided legal and training services to competitive operations at below market value and Pacific Bell employees performed unbilled work for unregulated affiliates; (3) properties were transferred from Pacific Bell to unregulated operations at below fair market value; (4) technology was transferred to competitive operations from Pacific Bell on an uncompensated basis; and (5) PacTel unregulated operations were gratuitously benefiting from their affiliation with Pacific Bell. California Public Utilities Commission, *A Report on Pacific Bell's Affiliated/Subsidiary Companies*, Proceeding No. A.85-01-034 (June 3, 1986).

Perhaps even more telling is the Department of Justice's recognition that "[o]ne cannot be as definitive with respect to the potential competitive effects of a [Regional Company's] provision of information services that use [its] local exchange facilities" as with respect to those that do not.¹⁸⁸ Report at 122.¹⁸⁹ As discussed above, almost all information services must and do use the Regional Companies' local exchange facilities.

In short, the reasons cited by the Court in 1982 and in 1984 are as valid today as they were then. There is no question but that the Regional Companies would have the same incentives and the same abilities attributed to them at that time, and that to open up the information services market to its full extent, as requested by some,

¹⁸⁸ Up-to-date information and constant availability are the features most sought by subscribers. Comments of Leghorn Publishing Company at 5.

¹⁸⁹ The status of FCC regulation and its lack of present effectiveness are of course no different in the information services market than they are with respect to interexchange services and manufacturing (*see* Part VI, *infra*), and the division of the Bell System into seven Regional Companies and what progress has been made with respect to equal access have likewise no greater weight here than they have in the other contexts discussed above.

would be to take the very risks¹⁹⁰ that neither the Department of Justice nor the Court were willing to take three years ago, and that the decree plainly forbids. The restriction on the sale by the Regional Companies of information content will accordingly be maintained. With respect to the issue of information transmission, *see* Part VIII, *infra*.

VI

Regulation

The Regional Companies and the Department of Justice argue that, unlike during the period prior to the entry of the decree, FCC regulation can now be depended upon to keep those in control of the local exchanges from engaging in anticompetitive activities, whether in inter-exchange services, in manufacturing, or in information services. The Court has carefully considered these arguments as well as the regulations on which they are based. Upon such consideration, the Court has concluded that there is no reasonable basis for assuming that the regulations will solve the antitrust problems presented by this case.

A. *General*

First. As discussed in Part I, *supra*, despite the decades-old requirements in the Communications Act, 47

¹⁹⁰ As the Committee of Corporate Telecommunications Users notes, there are also important privacy considerations at stake when, for example, a Regional Company, having control of its customers' lines of communication, will also have access to their lines of credit, travel plans, credit card expenditures, medical information, and the like. Comments at 17-19. On the basis of a subscriber's telephone calling patterns with respect to information, a Regional Company could easily pinpoint that subscriber for the sale of Regional Company-generated information and the sale of other products and services connected therewith, to the point where that company would have a "Big Brother" type relationship with all those residing in its region.

U.S.C. § 202(a), and various FCC regulations requiring nondiscrimination, equal access, and proper cost allocations, and notwithstanding the Commission's own persistent and dedicated efforts for a number of years, the FCC was unable to prevent or to remedy major anticompetitive abuses by the Bell System achieved through the activities of its local affiliates.

A substantial part of the trial of this case revolved around the ever-changing Bell strategies and the Commission's largely futile efforts to cope with these strategies. The Department of Justice argued, and at the trial it introduced voluminous expert testimony and other evidence in support of its argument, that the local exchanges are so complex and so technically dynamic, and that they comprehend so many and such complex joint and common costs, that regulation could not prevent anticompetitive activities.¹⁹¹ The Department accordingly stated in its Response to Public Comments on the Proposed Modification of Final Judgment, 47 Fed.Reg. 23,320-336 (May 27, 1982), at the time the consent decree was under consideration that:

¹⁹¹ See, e.g., Department of Justice Memorandum of August 16, 1981, at 46-47, 125 n.*, 161-62, 281-82, 285, 374; Department of Justice Pretrial Brief at 24-25, 79-84.

It was the Bell System's position at the trial, just as it is the position of the Regional Companies now, that regulation is an effective instrument for preventing and curbing any possible anticompetitive activities. The decree implicitly rejected that position.

Prior to the entry of that decree, the FCC, like the Bell System, and unlike its own two longtime chiefs of the Common Carrier Bureau (see pp. 531-32, *supra*), contended that the regulations were adequate to prevent anticompetitive abuses. See, e.g., Amicus Curiae Brief of FCC dated April 20, 1982, at 35-37. The Court instead accepted the contention of the Department of Justice, buttressed by the voluminous trial record, that the regulations could not solve the problems, and the decree was entered on that basis. *AT & T*, 552 F. Supp. at 187 n.229; Department of Justice Response of May 20, 1982, at 57.

At the heart of the government's case in *United States v. AT & T* was the failure of regulation to safeguard competition in the face of the powerful incentives and abilities of a firm engaged in the provision of both regulated monopoly and competitive services. Neither of these problems [cross-subsidization and discrimination] has thus far proven amenable to successful regulatory solution. Indeed, the very basis for divestiture is that the anticompetitive problems inherent in the joint provision of regulated monopoly and competitive services are otherwise insoluble. Thus, permitting BOC entry into competitive markets would undermine the rationale for the divestiture that is the central remedial mechanism of the modification.

The Department went on to say that there was "little possibility" that regulation would be capable in the future of detecting or preventing discrimination by the Regional Companies. Response of the United States to Public Comments, *supra*, 47 Fed. Reg. at 23336.¹⁹²

Second. At the time of the drafting of the consent decree, the parties also considered several detailed "regulatory" injunctions, in lieu of the more drastic solution finally adopted. These proposals were appropriately labelled by the parties "Quagmire I" and "Quagmire II." Department of Justice Competitive Impact Statement at 51-53. Ultimately, the Department concluded that regulatory measures could not "approach even remotely" the effectiveness of the more decisive decree that was submitted to the Court, *id.* at 53, and the Court endorsed that position. *AT & T*, 552 F.Supp. at 166-68.

¹⁹² The basic problem was then what it still is today: the FCC was attempting, without significant success (1) to define various rights of access to the monopoly switches and to enforce these rights, and (2) to allocate what are inherently almost unallocable joint and common costs of the Operating Companies.

There cannot be the slightest doubt, therefore, that as of the time of the entry of the decree, the parties¹⁹³ and the Court had concluded that regulation would not and could not be made to work, and that only the divestiture and the concomitant imposition of the line of business restrictions on the Regional Companies could be depended upon to prevent a resumption of anticompetitive activities.

Third. Given that record, reliance could properly be had on regulation as a basis for the removal of the decree restrictions only upon a showing of a reduced need for regulation or a substantial improvement in the regulatory language and practice.¹⁹⁴ Yet neither has occurred since 1982.

¹⁹³ The Bell System did not concede, and the Court was not called upon to find, that violations of the antitrust laws had occurred. *See AT & T*, 552 F. Supp. at 210-11. However, the decree proceeds on the basis of an implicit assumption to that effect. *See also AT & T*, 524 F. Supp. at 1336-1381.

¹⁹⁴ Several Regional Companies would stand the relationship between the decree and regulation on its head, contending that criticism of the efficacy of various FCC rules "are in reality rearguments of issues already presented to and rejected by the Commission." *E.g.*, Reply of Pacific Telesis at 42-45; *see also* Reply of Southwestern Bell at 21-23. The decree in this case was premised in substantial part upon the inadequacy of regulation as a means for dealing with practices that violated the Sherman Act. It is absurd to maintain that, if the same or similar regulations are still inadequate and that the decree's removal standard therefore cannot be met, the restrictions should be eliminated anyway because the Commission has not seen fit to adopt more effective regulations, and rearguments have either not been made or were made and have failed. The governing law of the case here is the decree, not FCC decisions.

Furthermore, the FCC is of course not charged with the duty of enforcing the antitrust laws; indeed, the Commission has suggested that it is quite prepared to ignore or override antitrust concerns. FCC Response in Opposition to AT & T Motion at 4-5.

In sum, the Regional Company arguments constitute simply one more attempt to reverse the burden of proof, evidently because of the realization that they could not satisfy the section VIII(C) standard. *See also* notes 26, 35, 38, 90, *supra*.

If anything, the need for the line of business restrictions is greater today than it was before the Bell System breakup. At least in theory, and to an extent in practice, the Bell System was regulated in almost all of its structures and operations.¹⁰⁵ By contrast, many of the current operations of the Regional Companies take place in unregulated markets. This complex mixture of regulated and unregulated activities provides these companies both with a powerful temptation and with ample opportunity to commit anticompetitive abuses in the competitive markets and to subsidize their competitive operations with profits earned in the monopoly markets.¹⁰⁶ In view of the fact that, when compared with the Bell System, the organizational state of the Regional Companies is much less rigid and far more complex—with their subsidiaries, partnerships, joint ventures, and other enterprises, some regulated, some unregulated, some regulated in part¹⁰⁷—discrimination against competitors and cross-subsidization are far more difficult to detect, prevent, and rectify through regulation now than they were in 1982.¹⁰⁸

¹⁰⁵ However, the FCC had no direct regulatory responsibility over Western Electric or Bell Laboratories. Department of Justice's Third Statement of Contentions and Proof at 1846.

¹⁰⁶ See also *United States v. AT & T*, 627 F. Supp. 1090, 1095-96 (D.D.C. 1986).

¹⁰⁷ In addition, the Regional Companies are frequently changing their organizational structure. See *Washington Post*, July 8, 1987, at F1, regarding an apparently fundamental change in the corporate structure of Bell Atlantic with substantial implications for monopoly and competitive operations.

¹⁰⁸ Since each of the Regional Companies operates in several states, the state and local regulatory bodies likewise have a very difficult job, for none of them is likely to be aware of the entire financial and operational status of a Regional Company. Thus, as the Colorado Public Utilities Commission points out, in a number of states the Regional Companies "are essentially unregulated although they absolutely and deeply affect the public interest," to the point where the Commission "cannot even look at the books and

Fourth. To the extent that there has been any recent change in the regulatory picture itself, it has been to weaken the regulations governing telecommunications carriers, not to strengthen them. This is shown most dramatically by the FCC's repeal of the separate subsidiary requirement for Regional Company competitive enterprises—a requirement that it had theretofore regarded as its most effective regulatory tool.¹⁹⁹ The FCC

records of U S West," the Regional Company in that area. Comments at 2. See also *Louisiana Public Services Commission v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

Several Regional Companies rely upon *Southern Motor Carriers v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), apparently for the proposition that the Sherman Act does not preempt state regulation. Reply of Pacific Telesis at 28-30. But the Supreme Court held in that case only that collective ratemaking activities are immune from antitrust liability under the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). That principle and that holding have no relevance to the instant lawsuit, let alone the instant proceeding.

¹⁹⁹ Strong cost allocation controls were in existence on paper long before the decree was entered, but they proved to be consistently ineffective. *AT & T*, 552 F. Supp. at 160-65; Department of Justice Response at 79-82. As noted above, FCC officials themselves conceded that the Commission could not prescribe cost allocation standards for the Bell System, and when that body began formulating the rules that would apply after divestiture, it concluded that *no measures short of structural separation* could prevent the Regional Companies from exploiting their monopoly power to gain unfair advantages in unregulated markets. *Policy and Rules Concerning the Furnishing of Customer Premises Equipment and Enhanced Services and Cellular Communications Services by the Bell Operating Cos.*, 95 FCC 2d 1117 (1983), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *aff'd on reconsideration*, FCC 84-252, 49 Fed. Reg. 26,056 (1984), *aff'd sub nom. North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985). Curiously, in light of that history, one of the first steps taken by the Commission to "strengthen" the regulations was to eliminate the separate subsidiary requirement.

On a related point, the Ohio Office of Consumers' Counsel aptly remarks that, in considering cross-subsidization issues, it is well

has also announced that it will preempt any state from attempting to require structural separation or otherwise to institute stricter safeguards for Regional Company CPE operations than its own. *CPE Decision*, 2 FCC Rcd at 158-61; BOC Structural Relief Order at ¶ 112.²⁰⁰

Fifth. Between the 1950s and the early 1970s, the FCC was committed, as was the nation generally, to vigorous regulation of a variety of business enterprises, especially those with public utility characteristics. Much of that has changed. The FCC and individual members of the Commission have repeatedly expressed themselves in favor of wide deregulation.²⁰¹ The Court of course does not express any judgment on the wisdom of that policy; that is beyond its jurisdiction. However, a regulatory body that is committed in principle to as little regulation as

to keep in mind that the "local" network is in significant respects a "long distance" network because it has been constructed to meet the requirements of long distance service. Comments at 8. Fiber optic loops, for example, are classified as a basic exchange service cost even though they are not needed or particularly beneficial for basic local telephone service. See NASUCA Comments at 12.

²⁰⁰ The suggestion is made by some, including the Department of Justice, Response at 81, that the public is protected from excessive weakening of regulatory supervision by the availability of judicial review of FCC action. However, that review is in some respects quite limited. The Court of Appeals may not interfere with FCC decisions not to reject carrier-sponsored tariffs. *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1234 (D.C. Cir. 1980). Even where a rate investigation is instituted, ratepayers have little judicial recourse. 47 U.S.C. § 204(a). And it is claimed by some that the Commission at times incorporates serious legal issues into ongoing investigations while permitting the challenged rates to go into effect so as to insulate them from judicial scrutiny. Comments of Aeronautical Radio, Inc., at 18-19.

²⁰¹ Former FCC Chairman Mark J. Fowler last year carried this policy to its logical end when he proposed that "a three-year trial of total deregulation of telecommunications would be implemented in states willing to undertake such experiments." Fowler, Halprin & Schlichting, *"Back to the Future": A Model For Telecommunications*, 38 UCLA Com. L.J. 145, 194 (1986).

possible can hardly be cited at the same time in support of the proposition that it will probably regulate more vigorously and more effectively than its predecessors which wanted to engage in tight regulation and operated in a general governmental environment that regarded strict regulation as a positive goal.²⁰²

Sixth. The FCC now has fewer resources with which to regulate telecommunications carriers than in the past, particularly in the difficult and complicated area of cost allocation that was a central issue in the trial and that is central to the issue of cross-subsidization today. Since the time of the entry of the decree, the FCC's budget and manpower have decreased significantly. In 1980, the FCC had an authorized ceiling of 2,103 employees; this had fallen by 1987 to 1,855 employees, and the Commission was apparently short by 120 employees of even that lower ceiling.²⁰³ According to former FCC Chairman Fowler, this "severe reduction of our staffing level, if allowed to continue, will limit our ability to meet the demands of our ever increasing workload in a timely and responsive manner." Testimony before Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies, U.S. House Committee on Appropriations, February 18, 1987, at 2-3.

B. *Cross-Subsidization*

The Court will now examine in more detail current regulations relied upon by those who claim that there has been a change and who, on that basis, advocate re-

²⁰² The lack of urgency with which the FCC approaches competitive issues is also exemplified by its bland comment that it had terminated an earlier proceeding on the equipment procurement practices of the integrated Bell System, although it "[stood] ready to revisit the issue. . . ." FCC Comments as Amicus Curiae (March 13, 1987) at 27.

²⁰³ The Commission recently eliminated three auditors, comprising one audit team, in its Common Carrier Bureau.

removal of the restrictions. This examination is conducted under two headings: regulations designed to deal with improper cross-subsidization; and regulations designed to prevent discriminatory interconnection. As will be seen *infra*, none of these regulations provides support for the cause of removal, for one of two reasons: (1) the particular regulation predates the decree and thus had addressed the problems on paper, but unsuccessfully, for many, many years; or (2) the regulation does not yet exist in effective form but is only on the drawing boards.

1. General

The cross-subsidization problem is as acute now as it ever was. The Huber Report states on the subject of cross-subsidization that (1) seventy to ninety percent of the costs underlying the interexchange access charges are joint and common; (2) the list of information provider costs that might overlap with exchange operating exchange costs is long and cross-subsidization opportunities are extensive; (3) there are substantial cross-subsidization opportunities in the Yellow Pages provision; (4) more than half the costs of a VSR service bureau (excluding network usage costs) are at least potentially shiftable; (5) seventy percent of electronic mail costs are potentially shiftable; (6) forty-four to seventy-eight percent of electronic credit card transaction services are potentially shiftable; and (7) seventy to ninety percent of alarm services costs are highly susceptible to misallocation.²⁰⁴ What changes have occurred from the situation

²⁰⁴ Report at 3.49, 6.35, 6.36, 9.7-9.9, 10.22, 11.18, 12.5, and 13.10. According to some of the Regional Companies, the Huber Report has concluded that cross-subsidy concerns are not weighty. See, e.g., Bell Atlantic Comments at 7. What Dr. Huber actually said was that "cross-subsidy through the shared use of resources that are *not* inherently common to regulated and unregulated operations is amenable to fairly straightforward regulatory supervision . . . Resources that are common to two classes of operations are another matter entirely. *The regulatory history of separating costs between*

revealed by the trial record have been toward the existence of more problems in regulatory oversight rather than fewer.

It is intrinsically difficult for a relatively small group of regulators to prevent cross-subsidization within several multi-billion dollar entities, particularly if the entities are as complex internally and as fluctuating organizationally as the Regional Companies. Not only does each of these companies, as noted, represent a complicated mix between regulated and unregulated affiliates and operations, but the products, too, lend themselves easily to such a practice. As Dr. Huber observed, “. . . regulatory requirements that [Regional Companies] buy equipment competitively crumble quickly when the product being purchased is technically complex and readily differentiated.” Huber Report at 14.13.

An additional problem arises from the large disparity in size between the two types of affiliates. A subsidy that may be vital to the operations of a relatively small, unregulated entity operating in the competitive marketplace, is likely to be impossible to detect on the books of the larger, regulated (telephone) entity. Huber Report

local and interexchange businesses is one of rampant and often deliberate cross-subsidy, blessed if not actually required by various regulatory bodies.” Huber Report at 3.53 (emphasis added). Professor Hausman, an expert retained by AT & T in its litigation against MCI, who now supports Pacific Telesis, contradicts this conclusion, but he is able to do so only by ignoring the lessons of the government's and the private AT & T litigation. Affidavit of Jerry A. Hausman, attached to Motion of Pacific Telesis Group for Waiver of the Line of Business Restrictions. Similarly, the opinion of Bruce E. Stangle that vertical integration is pro-competitive under the circumstances here (affidavit of Stangle attached to U S West Reply Memorandum, App. Tab 12, pp. 15-19) is both wrong and it cannot overcome the contrary conclusion reached by the Court when the judgment was entered (and when the Bell System's motion to dismiss was denied), that is the law of the case.

at 16.23. And of course it is to the books of the regulated affiliate that regulators would be looking.²⁰⁵

2. *Joint Cost Order*

As discussed above, previous regulatory programs did not succeed in preventing cross-subsidization in the Bell System with its far less complicated and less obscure structure. There is only one new FCC regulation of any significance to deal with this subject now,²⁰⁶ the so-called *Joint Cost* order.²⁰⁷ It is said to be the purpose of this order to ensure that carriers engaged in both regulated and unregulated activities will not improperly burden ratepayers or gain an anticompetitive advantage by assigning costs of unregulated activities to the regulated activities. Whatever may ultimately be effectiveness of that order (*see infra*), it cannot, in any event, serve as a substitute for the decree restrictions *now* because it is

²⁰⁵ Ameritech argues that cost shifting is held in check by the "persistent political and other regulatory pressures to hold rural residential and small business exchange rates below cost." Comments at 32 n.24. There surely is some such pressure. But the submissions from the state regulators and others suggest that, due to their visible and powerful presence in every area of the country, it is the Regional Companies that, by legacy from the Bell System, have inherited the latter's political influence.

²⁰⁶ The possibility of cross-subsidization is of particular concern in equipment markets with high research and development costs, since the greatest possibility for cross-subsidization is in research and development. *See* Huber Report at 17.14; Department of Justice Report at 205. The risk of cost misallocation also is particularly great in markets, such as central office switch and PBX manufacturing, where there are substantial common costs between the provision of local exchange services and the particular equipment manufacturing market. Department of Justice Report at 179; Huber Report at 16.22. Yet the FCC is not even actively engaged in regulating the procurement of equipment. Department of Justice Report at 174; Huber Report at 14.13; *see* note 202, *supra*.

²⁰⁷ *See Separation of Costs of Regulated Telephone Service from Nonregulated Activities*, CC Docket No. 86-111, FCC 86-534.

not yet finalized or in force and is not scheduled to become effective until some time next year, if then.

When the Department filed its Report in favor of the removal of some of the restrictions, based in significant part upon the *Joint Cost* order, the FCC had not even released the text of the order, and the Department's conclusions with respect thereto were reached on the basis of an FCC news release.²⁰⁸ But even the regulation that was ultimately issued is far from being in final form.²⁰⁹

As presently drafted, the order would require each of the Regional Companies to adopt a cost manual in accord-

²⁰⁸ Report No. DC-723, Mimeo No. 1246 (December 23, 1986) (Notice of Proposed Rulemaking).

²⁰⁹ In its current configuration, the *Joint Cost* order would provide that until a Regional Company files and obtains FCC approval of the newly required cost allocation manual, it must continue to conduct any CPE or enhanced services in accordance with the *Computer II* structural separation rules. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second) (Computer Inquiry)*, 77 F.C.C.2d 384 (*Computer II Final Decision*), modified on reconsideration, 84 F.C.C.2d 50 (1980) (*Computer II Reconsideration Order*), further modified on reconsideration, 88 F.C.C.2d 512 (1981) (*Computer II Further Reconsideration Order*), aff'd sub nom. *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938, 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983), aff'd on second further reconsideration, FCC 84-190 (released May 4, 1984).

The FCC's *Computer II* rules, adopted shortly before the decree was proposed, allowed AT & T and the Operating Companies, which were then AT & T subsidiaries, to provide CPE and enhanced services only through subsidiaries separate from their operating telephone companies. The FCC later determined that these rules should apply to the Regional Companies. *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117 (1983) (*BOC Separation Order*), aff'd sub nom. *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), aff'd on reconsideration, CC Docket No. 83-115, FCC 84-252, 49 Fed. Reg. 26,056 (1984) (*BOC Separation Reconsideration*), aff'd sub nom. *North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985).

ance with cost allocation standards,²¹⁰ and there would be rules for transactions with affiliates said to be designed to protect against cross-subsidization.²¹¹ The Regional Companies had until September 1, 1987 to file their proposed cost allocation manuals. These manuals will hereafter each be subject to public comment and subsequently to review by the FCC for final approval. Based on normal regulatory schedules, some substantial period of time will elapse before this process is completed, and implementation of such manuals as are approved will obviously take some additional time. Finally, there is the delay inherent in petitions for reconsideration, *see* p. 574, *infra*, and the ever-present likelihood of requests for judicial review.

The problems with the *Joint Cost* order do not end with the timing of its issuance in final form; they also relate to substance. As stated above, and as experience has amply shown, cross-subsidization is easy to achieve by firms engaged in both regulated and unregulated business but difficult to detect and to remedy. If regulations are to have any hope of success, they must facilitate such detection to the maximum extent possible. The *Joint Cost* order is not likely to accomplish this objective. To the contrary, it complicates the process of detection by allow-

²¹⁰ These standards are based upon a fully distributed costing methodology, with emphasis on direct assignment of costs based on causation to the maximum extent possible.

²¹¹ The affiliate transaction rules would generally require that transactions between the Regional Companies and their affiliates be recorded on the books at market price at such price can be determined from a price list or tariff. In the absence of a list or tariff price, assets transferred from a Regional Company to its nonregulated affiliate are to be recorded at the higher of netbook cost or fair market value, while assets transferred from the nonregulated affiliate to the Regional Company are to be recorded at the lower of these two figures. Services for which there exists no list or tariff price are to be valued in accordance with the cost allocation standards.

ing each Regional Company (1) to adopt a manual different from the others; (2) to choose its own cost allocation procedures; (3) to select its own accountants to review and certify the manual;²¹² and (4) to use its own reporting categories and terminology.²¹³ In short, there will be no common denominator. Additionally, the rules will apply only to interstate services, while much of the Regional Company business, mixed and interrelated though it is, is technically intrastate in nature.²¹⁴

The Commission had its own good reasons for adopting this particular system,²¹⁵ and the choice of regulatory means is obviously a matter for decision by that body, not this Court. But the issue before the Court is whether

²¹² As one intervenor correctly points out, much of the application of the FCC's rules to the billions of dollars in expenses and investment is a matter of policy rather than pure accounting, and certificates by the Regional Companies' own auditors therefore cannot serve as an effective check. Western Union Telegraph Company Comments at 3.

²¹³ All these differences and potential inconsistencies dash any hope of achieving the kind of "benchmark" comparisons which, it is argued by some (*e.g.*, Ameritech Comments at 8-12; NYNEX Comments at 8-9; U S West Comments at 36-37) will make anticompetitive actions easier to detect.

²¹⁴ See U.S. Sprint Comments at 30. Accurate auditing is further complicated by the fact that the Commission declined to require reporting at relatively precise intervals; that it authorized the allocation to regulated accounts of "incidental" expenses for up to one percent of a Regional Company's entire revenues (or approximately \$100 million per year); and that it required the companies to keep their records for only one year. FCC Joint Accounting Order at ¶¶ 182, 185, 77, 186.

²¹⁵ As the Commission stated (*Joint Cost Decision*, FCC 86-564 at ¶ 120 n.225:

We did not propose to prescribe a manual because we believed that the mix of nonregulated activities and the organizational structure would vary widely from carrier to carrier, and that a single manual would not adequately encompass all possible variations.

changes have occurred since 1984 to render obsolete the line of business restrictions of the decree. To pass on that issue, the Court must necessarily consider the efficacy of the regulations that have been suggested as one such significant change. It is difficult to escape the conclusion that, even if the *Joint Cost* order were actually in effect now—which of course it is not—it could not be regarded as a more effective regulatory instrument with respect to cross-subsidization than existed when the decree restrictions were adopted.²¹⁶

A final cloud is cast upon the *Joint Cost* order by the fact that at least four of the Regional Companies—which incidentally rely in this Court on the existence of that order to support their motions for removal of one or more of the decree restrictions—have petitioned the FCC for reconsideration of the order.²¹⁷ CC Docket No. 86-111, 62 Rad.Reg. (P & F) 163 (1987).

3. *Self-Help*

In the absence of effective regulation now, and with like prospects for the future, there is the suggestion that self-help is the answer. The Department of Justice believes that the line of business restrictions are not necessary even if regulation is absent or not particularly effective because, at least with respect to equipment manu-

²¹⁶ Western Union Telegraph Company, which conducted a study of the FCC's efforts to date to regulate the Regional Companies' access rates, found that "the FCC is no closer than it was 3½ years ago, when the first special access tariffs were filed, to determining whether the Regional Companies properly allocate costs to special access rate categories." Comments at 5-6.

²¹⁷ The petitioners include Ameritech, U S West, Southwestern Bell, and Bell Atlantic. According to the Consumer Federation of America, actually six of the seven Regional Companies have filed for reconsideration, seeking a methodology that would more easily permit a shifting of competitive costs to the ratepayers. Reply Comments at 5-6.

facture, most of the leading competitors could respond in kind by cross-subsidizing on their own.²¹⁸

That argument is not only in stark and fundamental opposition to the Department's position for the ten-year period when the *AT & T* case was pending in the courts prior to the entry of judgment; it also loses sight of the function of the antitrust laws.

There is not the slightest reason to conclude that Congress believed that antitrust violations should be remedied, not by resort to law, but by retaliatory self-help measures. More particularly, there is no evidence that the laws, the courts, and the regulators were intended by the Congress that enacted the Sherman Act, and by successive Congresses and Presidents that endorsed that statute as fundamental to American economic life, to be silent spectators at cross-subsidization battles between large corporations, some of them—like the Regional Companies here—already under Sherman Act judgment. The congressional purpose throughout has been to see anti-trust violations remedied in the courts under the rule of law, not through ordeal by combat or by survival of the fittest, or perhaps the least scrupulous.²¹⁹

C. *Interconnection*

Just like the regulations involving cross-subsidization, those which, it is claimed, will prevent discrimination in the installation or maintenance of interexchange transmission lines and the interconnection of lines or equipment, either predate the decree or are not in final form. Thus these regulations, too, fail entirely to provide assurance against such discrimination.

²¹⁸ Department of Justice Report at 205 n.434, 189.

²¹⁹ The suggestion that the law should view with passivity the use of monies extracted from ratepayers pursuant to governmental public utility regulation as subsidies for the utilities' unrelated competitive enterprises would have startled not only Theodore Roosevelt and Thurman Arnold but also Adams Smith and Milton Friedman.

1. *Part 68*

The scene is appropriately set by the Department of Justice's 1982 defense of the decree, as follows:

Particularly in a technologically dynamic industry such as telecommunications, there is little possibility that regulation is capable of detecting or preventing the very subtle forms of discrimination that would be available to the BOCs. Thus, even were it possible to prescribe in detail the appropriate technical parameters of interconnection under current technological conditions, regulators would have to have sufficient foresight to determine in advance the discriminatory potential inherent in tomorrow's technology . . . Even if it were possible, moreover, effectively to monitor the technical aspects of interconnection in an evolving technological environment, there would remain still more subtle means of discrimination in operational activities, such as the timely provision, maintenance, testing and restoration of facilities. In short, the BOCs, if permitted to engage in competitive activities, would have substantial ability to frustrate regulatory attempts to prevent discriminatory conduct.

Response to Public Comments at 58.

The Department of Justice now asserts that the FCC regulations that provide the requirements for the connection of terminal equipment to the local network, the so-called Part 68,²²⁰ limit the risk of interconnection discrimination. *See, e.g.*, Department of Justice Report at 187-88 n. 379, 163-64.

Reliance by the Department on Part 68 is truly ironic: these regulations were adopted in 1975, 1976, and 1977; they had become fully operational long before divestiture; and, most notably, they were the subject of much testimony and argument adduced by the Department during

²²⁰ 47 C.F.R. § 68 (1986).

the trial of this case, all of it designed to demonstrate that they were ineffective. In 1982, the Department noted that "the very basis for divestiture is that the anticompetitive problems inherent in the joint provision of regulated monopoly and competitive services are *otherwise insoluble*." Response of the United States to Public Comments (May 20, 1982). Even if the technical aspects of interconnection were susceptible to regulatory monitoring, "there would remain still more subtle means of discrimination in operational activities such as timely provision maintenance, testing, and restoration of facilities." *Id.* The trial evidence did, in fact, demonstrate the FCC's lack of success in the enforcement of these regulations,²²¹ and neither the Department nor any Regional Company has pointed to any developments indicating that these enforcement problems could be or have now been overcome.²²²

2. Regulations Not Yet Adopted

The proponents of a removal of the restrictions contend with somewhat more confidence that the FCC's *Computer III* decision²²³ would impede the Regional Companies' ability to discriminate with respect to interconnection. That decision permits the Regional Companies to provide

²²¹ The Department of Justice observes with wry understatement that the "regulations pre-dated the [decree], but the FCC initially had difficulty enforcing them against AT & T." Report at 164 n.323.

²²² Even if these regulations had now, somehow, become more effective, it would not advance the arguments of its proponents by very much. Part 68 does not apply to many services, including analog private lines (to which approximately seventy-five percent of all high-speed business modems are connected), new digital service, and new data-over-voice services, and it also fails to prescribe the standards necessary to ensure that CPE will effectively operate in conjunction with the transmission service to which it is connected.

²²³ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, F.C.C. 86-252 (released June 16, 1986) (*Computer III*).

enhanced services, i.e., generally speaking, information services ²²⁴ without the structural separation that was required by the earlier *Computer II* decision, provided that those entities comply with newly developed Comparably Efficient Interconnection (CEI) ²²⁵ and Open Network Architecture (ONA) ²²⁶ requirements. These requirements are claimed to have been designed to ensure equal access to network facilities, ²²⁷ and both the Department of Justice and the Regional Companies contend that a Regional Company's ability to discriminate will be limited by the "open architecture" switches. See, e.g., Department of Justice Report at 177 n. 352.

Just as is true of the *Joint Cost* order, reliance on the requirements of ONA and CEI is at a minimum premature. At this juncture, ONA is only a "developing concept," and "full implementation of ONA is several years away." ²²⁸ The ONA plans of the Regional Companies are not even scheduled to be filed until February

²²⁴ Nothing comparable to the *Computer III* rulemaking has been undertaken regarding equipment procurement. Dr. Huber and the Department of Justice accordingly agree that "the discretion afforded management in purchasing decisions by regulators is quite broad." Huber Report at 14.13, 14.17.

²²⁵ CEI requires the Regional Companies to offer to enhanced service providers, with some exceptions, the same interconnection features on an unbundled basis and at the same price, as are enjoyed by these companies for their own equivalent services. *Computer III*, 104 F.C.C.2d at 1039-43, 1046-53.

²²⁶ ONA would theoretically unbundle the components of exchange services and permit the purchase of each component or "basic service element" under tariff on an "equal access" basis. *Computer III*, 104 F.C.C.2d at 1019-20, 1063.

²²⁷ *Computer III* ¶¶ 4, 97; Department of Justice Report at 29-30. Interestingly, the Department of Justice believes that it was the prospect of scrutiny by this Court that was a substantial factor in motivating the Regional Companies to suggest ONA to the FCC in the first place. Department of Justice Report at 140 n.278.

²²⁸ Department of Justice Report at 142 and n.282.

1, 1988,²²⁰ and the FCC will then receive public comment on these plans. After studying the comments and adjusting the regulation in accordance with this new information, the Commission will then presumably take further action of an as yet unspecified nature.²²⁰

These rules have already experienced extended and bitter controversy, and submission of the ONA plans by the Regional Companies is likely to engender further delay and dispute. Indeed, just as is true of the *Joint Cost* rules, ONA, too, is under challenge before the FCC by the very entities that rely in this Court on its requirements as making unnecessary the decree restrictions in this case.²³¹

²²⁰ *Computer III* ¶ 114; Department of Justice Report at 141.

²³⁰ As Cox Enterprises, et al., puts it “[g]iven its complexity, lack of definition, and the likelihood that ONA will be subject to a period of trial and error (if not further refinement) once implemented, the Department’s reliance on ONA as an effective and reliable protective shield against anticompetitive behavior is premature and speculative.” Joint Intervenor Comments at 12; see also Comments of GTE Corporation at 12.

²³¹ Southwestern Bell, which contends in this Court that the ONA plans are effective and not vague (apparently because representatives from that company held meetings on ONA with information providers and attended a national forum on ONA (Response at 44)), has filed a petition for reconsideration with the FCC challenging its authority to impose ONA requirements. Petition for Clarification and Limited Reconsideration, CC Docket No. 85-229, Phase 1, at 4-11 (filed August 4, 1986). Challenges to ONA have also been filed by Bell Atlantic, BellSouth, and U S West.

The California PUC has also petitioned for reconsideration on the different ground that the *Computer III* decision improperly preempts the states’ authority. Consumer Federation of America Comments at 16. The FCC represents that these petitions, as well as others, have been mooted by its adoption of orders addressing those petitions and issues at its meeting of March 26, 1987. The FCC does not state, however, how these issues have been mooted or resolved, stating only that those decisions will be released “in the very near future. . . .” FCC Response at 37 and n.79.

The Department of Justice itself concedes that it is "unclear just what the impact of ONA on the potential for discrimination will be and how those effects will vary from market to market." Report at 177 n. 352. In fact, the Department also acknowledges that stronger controls were in effect before the decree, and that these controls were ineffective. Report at 164 n. 323.

In short, since ONA has neither been fully defined nor adopted or tested in the real world,²³² it is impossible to evaluate its effectiveness in preventing discrimination in interconnection²³³ or, obviously, to rely on it as ensuring, in the words of section VIII (C) of the decree, that there is no substantial possibility that the Regional Companies could use their monopoly power to impede competition.²³⁴

²³² The Department of Justice concedes that "[i]t is not clear that the FCC possesses the authority to require the [Regional Companies] to make extensive and expensive network design changes" (Response at 74)—changes which may well be necessary if ONA is to work at all.

²³³ Even small transmission problems can greatly affect the viability of competitive providers. See U S West Response, Tab 1, at p. 8.

²³⁴ The Centralized Operations Groups (COGs), which process, coordinate, and schedule orders for CPE interconnection, are also claimed to reduce the possibility of discrimination, particularly with respect to installation, repair and maintenance of CPE. Department of Justice Report at 164. COGs are not, however, the exclusive means by which CPE vendors place their orders. For example, a Regional Company's own CPE vendor does not have to place its orders through this mechanism. BOC Structural Relief Order at ¶¶ 82-83. The COGs were developed primarily for orders placed by PBX and key system vendors and have rarely been used for orders placed by data communications equipment vendors. It is not clear whether a Regional Company manufacturing CPE would have to place orders for interconnection of its own CPE through the COGs. Furthermore, the COGs are not required to handle maintenance. BOC Structural Relief Order at ¶¶ 82-83.

3. *ONA Suffers From Significant Defects*

Additionally, here again, even if these regulations were fully in force and effect, they would not be likely to have a decisive impact, for several defects in such standards as have been announced are already apparent.

First, as several intervenors²³⁵ note, ONA will apply only to digital switches—switches that serve only one-fourth of all access lines available. Second, ONA will not assure equal access or equal cost since it will not require the Regional Companies to provide colocation of competitors' enhanced services within the Regional Companies' central offices.²³⁶ Third, the Regional Companies will have no incentive to provide equal access for rival enhanced services providers, for with respect to these potential competitors, the Regional Companies will not be disinterested parties if the restriction is lifted. Fourth, ONA, as it stands now, will not address problems that will arise with new technical developments, but it applies only to conditions that pertain to current technology and those that are plainly anticipated now.²³⁷ Fifth, the only Regional Company to have filed its CEI plan as of May 1987—Bell Atlantic—has submitted what may be a flawed product, for it eliminates outside plant and transport costs for its own service, while charging standard

²³⁵ *E.g.*, Compuserve Comments at 31; MCI Response at 56.

²³⁶ Comments of Consumer Federation of America, at 15; U S Sprint at 30; IDCMA at 53-54.

²³⁷ While the Regional Companies' ONA plans must allow all competitors to obtain "unbundled and equal" access to "basic service functions," *see* Department of Justice Report at 141, the Regional Companies retain control over the degree of unbundling, the development of new basic service functions, and the price for access to these functions. Thus, whenever a competitor's product or service will require novel and specialized access requirements, the Regional Companies' will have a further opportunity to discriminate in the form of access.

tariffs for competitors' access. Reply to Consumer Federation of America at 7.²³⁸

4. *Other Standards*

The Regional Companies and those who support their requests also place some faith in national and international standards for interconnection.²³⁹ But not only is it not at all clear that across-the-board, uniform national standards even exist,²⁴⁰ but what standards there are have in part been established by private organizations, some of them dominated by the Regional Companies themselves.²⁴¹ Furthermore, the existing standards are strictly voluntary and could be ignored by the Regional Companies if they wished:²⁴² to deploy a new service, a Regional Company need only file a tariff.

²³⁸ As for the CEI requirements, they provide very little protection against discrimination because there are numerous possible interpretations of CEI, MCI Comments at 55 n.161, and because a Regional Company need not provide CEI until it decides to offer an enhanced service. United Telecommunications Comments at 21-22. The *Computer III* rules require that a Regional Company seeking to provide a particular enhanced service on an unseparated basis first obtain FCC approval of a plan providing CEI for other enhanced service providers. *Computer III* ¶ 190. 104 F.C.C.2d at 1054-55.

²³⁹ See, e.g., Department of Justice Report at 164.

²⁴⁰ Compare Department of Justice Report at 196 with IDCMA Comments at 42 n.101.

²⁴¹ For example, the T-1 Committee, administered by the Exchange Carriers Standards Organization, is said to be dominated by the Regional Companies. The Court has considered the lengthy Skizypczak affidavit submitted by NYNEX regarding that Committee; it has also considered, however, that the Committee has apparently yet to issue a single standard. Bell Atlantic's claim that standards "are now set" by the T-1 Committee, Memorandum in Support of Motion at 12, thus appears to be incorrect.

²⁴² Huber Report at 16.19. Regional Companies have ignored national standards when it suited their purpose, as evidenced, for ex-

International standards, developed in the Consultative Committee on International Telephone and Telegraph, have already proved not to be effective constraints, for although they have been in place for several years, the United States government and American corporations have generally ignored them.²⁴³

D. *Network Design Information*

FCC regulations require the Regional Companies to disclose, reasonably in advance of implementation, information regarding the introduction of new network services or changes in existing network services as well as additional marketing information, when such information is provided to their separate subsidiary.²⁴⁴ This regulation, too, was in existence and governing at the time of divestiture, and it did not prevent Bell System anticompetitive conduct based on the timing of disclosures. *See AT & T*, 524 F.Supp. at 1371-76.

Moreover, the FCC has actually weakened the disclosure requirement since that time.²⁴⁵ *See BOC Struc-*

ample, by Pacific Telesis' Project Victoria, which involves a non-standard version of an integrated services digital network and which required AT & T to redesign a certain type of its switched digital service to provide for dedicated access. Similarly, data-over-voice equipment designed for connection to BellSouth services in Florida will not work with NYNEX services in New York. IDCMA Comments at 42-43.

²⁴³ IDCMA Comments at 42 n. 102.

²⁴⁴ 47 C.F.R. § 64.702(d)(2); *Computer and Business Equipment Manufacturers Association*, 93 F.C.C. 2d 1226 (1983) (*Disclosure Order*). In addition, the FCC has required carriers that are not subject to structural separation to disclose such information reasonably in advance of implementation. *Computer II Reconsideration Order*, 84 F.C.C. 2d at 82; *see also* 47 C.F.R. § 68.110(b) (1985).

²⁴⁵ The weakening changes of the disclosure requirement have been adopted predominantly for the Regional Companies' marketing of CPE, matters addressed in CC Docket No. 86-79. *See Fur-*

tural Relief Order at ¶¶ 50-51. As a result of that order, the disclosure obligation is triggered only when the Regional Company makes a decision to "make" or "buy" a product that relies on the new or changed network characteristic. In addition, even when the trigger point for disclosure is reached, information is made available only to those manufacturers who enter into nondisclosure agreements with the Regional Companies.

Consequently, a Regional Company is now able to use network information to design its new equipment or CPE device as soon as the information is finalized by the network planners, while other manufacturers must be furnished the information necessary to engage in similar design activities only when the Regional Company is actually ready to fabricate its new product. Most of the time this will be so late, given time needed for the design phase, that independent manufacturers will be unable to compete. The FCC itself has previously recognized that disclosure at this period would sometimes be "too late." See Disclosure Order, 93 F.C.C.2d at 1224.

Additionally, the regulations do not require disclosure of information necessary for the design of equipment that will meet the specifications of the Regional Companies' exchange networks; they only require the disclosure of network changes that affect "intercarrier interconnection or the manner in which customer premises equipment is attached to the interstate network." 47 C.F.R. § 64.702(d)(2). That being so, the data communications market will be especially susceptible to discrimination.

Data communications equipment requires careful attention to and coordination with all the parameters of

nishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, CC Docket No. 86-79, FCC 86-529 (released January 12, 1987) (BOC Structural Relief Order).

the transmission facilities with which it is to be used, because such equipment is operable only if the equipment at the customer's premises mirrors that at the exchange carrier's serving offices—the standard for one dictates the standard for the other. Thus, any disparity in access to information about the characteristics of existing, changed, or new transmission services can result in substantial differences in equipment design, characteristics, and costs. Since the FCC regulations do not require the disclosure of network requirements, their effect is likely to be to leave independent manufacturers hopelessly behind.

The FCC has also issued regulations that are claimed to prevent a Regional Company from obtaining an unfair head start over CPE rivals. These regulations would in theory prevent a Regional Company from using its local exchange status to utilize customer proprietary information unavailable to rivals in a dependent competitive market. 47 C.F.R. § 64.702(d)(3) (1986); BOC Structural Relief Order at ¶ 70. *See* Department of Justice Report at 164-65; Response at 113. However, that regulation, too, contains at least one very large loophole.

The regulation addresses only the use of customer proprietary network information for CPE marketing; it is not concerned with CPE manufacturing even though manufacturing information could and no doubt would also be used to gain advantage in that market. It is generally understood that it is highly important for anyone attempting to decide what new products to develop to have access to information regarding customers' network configurations, traffic patterns, and current equipment capabilities. The Department of Justice, for one, recognizes this defect but overcomes it by "presuming" that the FCC "would impose customer information rules that would prevent a BOC from discriminating. . . ." Report at 187-88 n. 379. This speculation is an insufficient foundation upon which to base the removal of a restric-

tion that effectively and *presently* reduces the possibilities of discrimination.²⁴⁶

In sum, the regulations relied upon by the Regional Companies and the Department of Justice to curb discrimination by the Regional Companies against their putative competitors in the markets they seek to enter are entirely inadequate: they either predate the decree and were found at the trial to be ineffective; they are not sufficiently comprehensive; they contain large loopholes; or they are a long way from being promulgated, let alone being implemented.

VII

Regional Company Activities and Public Policies

In addition to the factors discussed in the preceding sections of this Opinion upon which the Court's decision denying the motions for removal of the core restrictions is based, there are several other considerations much mooted by the parties and intervenors. Since these con-

²⁴⁶ The FCC regulation also permits Regional Company CPE personnel to have access to the CPNI of only those multiline business customers that have provided the Regional Companies with written authorization for such access; such information will be available to competing CPE vendors only if the customer takes affirmative action to permit them to have access. BOC Structural Relief Order at ¶ 70. Even though some CPE users may be sufficiently alert to seek competing bids from both Regional Company and non-Regional Company CPE vendors, the phenomenon of inertia and the inherent limitations on the dissemination of information will probably create an additional inequality between CPE vendors affiliated with a Regional Company and those that are not. IDCMA Comments at 39; *cf.* Department of Justice Response at 114; FCC Comments at 18. As Dr. Huber concedes, the effectiveness of these regulations will in practice will be difficult to ascertain. Huber Report at 16.22. *Accord* CBEMA Comments at 17-27; Consumer Federation of America Comments at 5-16; ICA Comments at 5-6; MCI Comments at 54-62; NASUCA Comments at 8-24; Tandy Comments at 28-29; USTSA Comments at 46-49; Washington PSC Comments at 23-24.

siderations are argued at some length by parties and intervenors, and since the Court also refers to them at times, they are discussed herein, albeit not at great length or detail. However, it should be noted that, with the exception of the topics discussed in Parts VIII and IX, *infra*, these considerations do not have an actual impact on the Court's decisions.

A. *Current Anticompetitive Activities*

The Regional Companies are of course limited in the breadth and scope of the anticompetitive activities in which they are able to engage inasmuch as the most effective vehicles for such activities are beyond their reach due to the existence of the core restrictions of the decree. What is startling, however, is given the relative paucity of the field available for such acts, in how many ways these companies appear²⁴⁷ nevertheless to have managed to discriminate and to cross-subsidize.

1. *Individual Companies*

Dr. Huber observes in his report that the Regional Companies²⁴⁸ are continuing to use their monopoly power "to discriminate among users in the prices they charge for functionally identical switched lines." Huber Report at 2.9, 2.18-2.19, so as to impede competition in the intra-state toll markets. For example, the companies "have generally priced private lines so that (1) those terminating at AT & T facilities cost the most, (2) until April 1986 private lines terminating at other carriers' facilities were somewhat cheaper, and (3) lines terminating at LEC facilities or at private nodes remained the cheapest"

²⁴⁷ In view of the disposition of the motions on other grounds, it is not necessary for the Court to reach definitive conclusions with respect to these Regional Company activities, although much circumstantial evidence supports the necessarily largely anecdotal conclusions discussed herein.

²⁴⁸ According to the report, this is also true of other LECs.

(footnotes omitted). Report at 3.34; *see also* Report at 3.48 and n. 153. Similarly, the Department of Justice states that the complexities of access charge pricing give the Regional Companies ample opportunity to manipulate these prices to their advantage, and that "such discrimination is not easy to remedy." Response at 34.²⁴⁹

More specifically, the Huber Report observes that, in the mobile services field, where because of the peculiar nature of the industry and the services a closer relationship exists between permitted and prohibited activities than is true elsewhere, Regional Companies have already (1) denied technically efficient interconnections to competing cellular carriers; (2) filed tariffs which set higher rates for competing cellular carriers than were offered for their own interconnections;²⁵⁰ (3) imposed unreasonable and non-cost-based charges for interconnection; (4) threatened to discontinue service to competing cellular carriers if they did not accept whatever interconnection contracts were offered to them; and (5) refused to provide compensation to carriers that terminate or originate cellular calls on behalf of a landline carrier. Dr. Huber therefore concluded that "direct competition between [Regional Companies] and non-wireline mobile carriers does raise serious questions about discriminatory access."²⁵¹

²⁴⁹ The Department cites, *inter alia*, its experience with attempting to resolve an AT & T complaint about U S West's allegedly discriminatory access pricing in connection with services to the General Services Administration, where nearly a year after the filing of the initial complaint with the Department, definitional and remedial issues still remain unresolved. Response at 34-35.

²⁵⁰ Further, as one intervenor suggests, the interconnection charges paid by a Regional Company through its wireline carrier will typically go into the pockets of that same Regional Company's telephone subsidiary, thus rendering the Regional Company itself immune from unreasonable, non-cost based interconnection rates. Radiophone, Inc. Response at 3.

²⁵¹ Huber Report at 4.9-4.19. Dr. Huber also found that, among the ways in which the Regional Companies may gain anticompetitive

Regional Company efforts, similar to those of the Bell System in its heyday, to escape regulatory scrutiny seem also to be continuing. In September 1986, a committee of the National Association of Regulatory Utility Commissioners (NARUC), issued a report based upon audits of five Regional Companies—Bell Atlantic, Bell-South, U S West, Ameritech, and Pacific Telesis. The committee found that (1) during the audit process, the Regional Companies consistently attempted to block access to accounting and cost allocation records; (2) the information provided was frequently of poor quality; (3) the audit revealed that customers of several Regional Companies had improperly been forced to subsidize the activities of competitive subsidiaries of these companies; (4) valuable lines of service (*e.g.*, Yellow Pages) were transferred from the telephone companies to unregulated subsidiaries;²⁵² and (5) the Regional Companies tended to transfer virtually all telephone income to the parent Regional Companies, with minimum infusions of equity from these companies to the telephone subsidiaries.²⁵³

advantages over the non-wireline carriers are discriminatory provisioning and maintenance of service; alteration of network standards; access to non-wireline business and growth plans; access to customer proprietary information; joint marketing activities; and cross-subsidies. Huber Report at 4.18, 4.21 n. 76, 4.22.

²⁵² The lack of restraint practiced by some Regional Companies is illustrated by those actions. The Court required an amendment of the proposed consent decree to provide for the transfer of the Yellow Pages to the Regional Companies, in significant part as a means for subsidizing local telephone rates. *AT & T*, 552 F.Supp. at 194. Notwithstanding that history, Yellow Pages profits now frequently go elsewhere (although it appears that, in some instances, transfers of the directory businesses to non-telephone affiliates were halted after state-initiated court battles).

²⁵³ No procedures are prescribed, or even under consideration, by the FCC for identifying the cost of the access services that the Regional Companies would have to provide to themselves in furnishing interexchange services. Such a task would appear to be immense.

Comments of Washington Utilities and Transportation Commission at 3-5, citing "Summary Report on the Regional Holding Company Investigations," National Association of Regulatory Utility Commissioners, Washington, D.C., September 18, 1986. Similar findings were reported by the staff of the California Public Utilities Commission with respect to Pacific Telesis.²⁵⁴

Further, in actions that likewise remind the Court of much of the evidence adduced during the trial regarding the Bell System's maneuvers toward competitors' requests, Bell Atlantic claims that it is technically impossible to provide equal access for mobile calls originating and terminating in the Washington/Baltimore area (Opposition to Conditions at 11-12); BellSouth says that it cannot do so for calls terminating at a mobile phone in certain cellular service areas (Response at 9); and according to complaints filed with the Department of Justice, Bell Atlantic, NYNEX, and Southwestern Bell have all refused to furnish to interexchange carriers access to information, such as the mobile service customers' names, that is a necessary prerequisite to the marketing of the carriers' services. Dun & Bradstreet Corporation Comments at 34-37; Phonequest, Inc. Comments at 15; ALC Communications Corporation Comments at 29-30; Huber Report at 3.30 & n. 105.²⁵⁵

A number of other allegedly anticompetitive acts of Regional Companies have been brought to the attention of the Court, the Department of Justice, the FCC, or the public by various segments of the telecommunications industry. See, e.g., pp. 566-67, and note 101, *supra*.

²⁵⁴ California Public Utilities Commission, *A Report on Pacific Bell's Affiliated/Subsidiary Companies*, Proceeding No. A.85-01-034, Exec. Summary at 2-3 (June 3, 1986).

²⁵⁵ The Department of Justice has declined to take action, but the Court is considering the matter. See Order of May 19, 1987, ordering the Department to file a report.

These individual complaints will no doubt be resolved in due course, and in any event, no purpose would be served by a catalogue here. Such a listing would be bound to leave out some meritorious claims, and it is equally probable that it would include others that will ultimately be determined to be unfounded. It may be useful, however, to examine the recent performance of the Regional Companies from a somewhat broader perspective.

2. Statistical Analysis

Following the divestiture, the telephone Operating Companies controlled by the Regional Companies requested and were awarded large rate increases almost everywhere in the nation,²⁵⁶ even though their profits substantially exceeded those of comparable corporations. Regional Company return on equity amounts to 14.0 percent compared to an all-industry composite of 10.9 percent.²⁵⁷ At the same time, in addition to their twenty-two telephone Operating Companies, the Regional Companies have created some one hundred-fifty corporations, partnerships, subsidiaries, and other entities having sometimes but a remote relationship to telephone operations. *Business Week* has estimated that the Regional Companies spent \$1.2 billion in 1985 acquiring real estate, financial services, software, publishing companies, and the like. The companies are publishing Yellow Pages in

²⁵⁶ The rate increases were frequently requested based on the fact of the AT & T divestiture although divestiture had nothing to do with them.

²⁵⁷ Cooper and Kimmelman, "Divestiture Plus Three: Still Crazy After All These Years," 9, Consumer Federation of America, December 1986. Accordingly, arguments such as those of Ameritech, echoed by other Regional Companies, that the entry of the Regional Companies into interexchange services is "essential to [their] financial health . . . and the viability of their networks" and that unless this is done they "face a bleak future" (Comments at 48, 50), ring hollow, to say the least. Their lack of substance is underlined by the fact that profits are not being channelled to the local telephone networks but away from them. See *infra*.

Australia, they are building cellular phone networks in Costa Rica, and they are selling real estate in Dallas. "The Baby Bells Take Giant Steps," *Business Week*, December 2, 1985.

An observer might well be justified in concluding that the participation of the Regional Companies in these far-flung enterprises is bound to diminish their management's interest in and attention to the local telephone business—that, after all, was these companies' *raison d'être*, and that is still the aspect of their operations most vital to the public since, under present conditions, if the Regional Companies do not attend to local telephone service, no one will or can.

More to the point of the present discussion, however, what is wrong from an antitrust point of view with the combination of (1) telephone rate increases and (2) Regional Company outside ventures is that these ventures appear to have been funded from and are being supported, at least in part by the local phone rates. The following table compares the performance of the Regional Companies' telephone operations with those of their non-telephone subsidiaries and affiliates engaged in competitive enterprises.

	Income from Telephone Operations ²⁵⁸	Income or Loss From Competitive Subsidiaries
Ameritech	1820	-65
Bell Atlantic	1828	-59
BellSouth	2435	-4
NYNEX	1776	-79
Southwestern Bell	1630	-36
Pacific Telesis	1799	-47
U S West	1684	-180

Thus, during the period in question, the Regional Companies had a total operating income from their telephone

²⁵⁸ Figures in millions of dollars. SEC Forms 10Q reflecting operating income or loss for 1985 through the third quarter.

operations, paid for by the ratepayers, of almost \$13 billion, and a loss from their competitive enterprises amounting to close to one-half billion dollars.²⁵⁹ These figures suggest that the rise in local telephone rates during the past several years²⁶⁰ may be due in some significant part to cross-subsidization, that is, the diversion of ratepayers' monies to finance the Regional Companies' ambitions to become full-fledged players in conglomerate America.²⁶¹

The Regional Companies are now requesting entry into far broader competitive fields of endeavor than any in which they were permitted to function during the last three years. Based upon their performance during that three-year period, it would not be unreasonable to assume that cross-subsidization would also take place with respect to these new markets, and that it would occur on a far wider and more destructive scale than heretofore. That is so if only because cross-subsidies are much more easily concealed where—as between local exchange service and interexchange, telecommunications manufacturing, and information services—there are many common costs that can be attributed, almost at the companies' unfettered choice, to any of the various activities, than where cross-subsidization is attempted between exchange service and ventures foreign to telecommunications (*see* Part IX, *infra*).

One likely consequence, then, of Regional Company entry into the interexchange, manufacturing, and information services markets would be to give these companies

²⁵⁹ The actual figures are \$12 billion 972 million, and \$470 million respectively.

²⁶⁰ For an evaluation of trends in local and long distance rates, *see* note 328, *infra*.

²⁶¹ *See* Electronic Industries Association Information and Telecommunications Technologies Group Opposition at 31-32; NACUSA Comments at 21, 39, 41.

the ability to undersell their rivals in these markets because they would have at their disposal an ever-replenishing fund with which to subsidize their competitive operations—the monies contributed pursuant to regulatory compulsion by the nation's local ratepayers.²⁶² The decree was, of course, aimed in significant part at the avoidance in the future of such practices.

B. *Other Public Policies*

A number of well-defined public policies were considered by the Court when it approved the proposed consent decree. As the Court then stated, while the issues of competition and the effects of competition or obstacles to free and fair competition are “at the heart of the antitrust laws,” and must therefore be deemed matters of paramount concern with respect to the decree, *AT & T*, 552 F.Supp. at 150, “when choosing between effective remedies, a court should impose the relief that impinges least upon other public policies.” *Id.* at 150-51. As elaborated on below, the Court took account at that time of such interests as ratepayer protection, the congress-

²⁶² It is relatively easy, at least in some states, for the large and powerful Regional Companies to secure rate increases from the relatively small, understaffed local regulators who, moreover, are confined jurisdictionally to substantially smaller geographic areas. See note 198, *supra*.

According to the Ohio Office of Consumers' Counsel, Bell of Pennsylvania offered \$100 million for state economic development in exchange for deregulation legislation. Reply at 13. A recent comprehensive report of the operations of NYNEX complains about the inability of regulators over the opposition of NYNEX to secure financial data, to halt the diversion of economies achieved by the regulated segment to the benefit of non-regulated operations, and similar problems. New York State Department of Public Service, *Report on NYNEX Corporation and Affiliates* (March 1987). And the trade press reported recently that U S West informed state regulators in its area that the location of its planned research laboratory would depend upon the fate of deregulation legislation or upon requested rate increases, a charge that U S West has denied. *Communications Week*, August 3, 1987, at 1.

sional mandate of universal service, and the First Amendment, among others, *AT & T*, 552 F.Supp. at 183-88, and so did the Department of Justice. *See, e.g.*, Competitive Impact Statement, February 10, 1982, at 47.

Entities such as AT & T and MCI now argue for consideration of the same types of factors as were considered before, AT & T Comments at 63; MCI Comments at 92-95, while the Department of Justice and the Regional Companies contend that the Court is precluded from doing so. *See infra*. As indicated in Part II, *supra*, the same standards may be applied in proceedings addressing continued viability of the restrictions as were used in determining whether the restrictions were to be imposed in the first place.²⁶³ The positions of the Department and the Regional Companies with respect to the consideration of such factors are not only at odds with that test, they are also inconsistent with the views these entities have expressed in the past and some that they are expressing even now.

First. The Department of Justice and the Regional Companies contend repeatedly that the Court may not consider the effect of its actions or its failure to act with respect to the restrictions upon the rates the public may be required to pay. The Department, indeed, baldly states that "neither Congress nor the state legislators have granted the Department or federal antitrust courts the responsibility of protecting ratepayers from . . . overcharges." Report at 166.²⁶⁴

²⁶³ CyberTel Corporation suggests, with some justification, that removal of restrictions should appropriately encompass the Tunney Act public interest standard that governed approval of the decree and that was responsible for the inclusion of the very section VIII(C) at issue here. Comments at 4. *Cf. FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93, 73 S.Ct. 998, 1003, 97 L.Ed. 1470 (1953). Unless this is done, the imposition of restrictions and their removal may be governed by disparate tests—a situation that could result in severe logical and practical difficulties.

²⁶⁴ Others are even less circumspect. Thus, Ameritech contends that the Court should not concern itself with conditions designed to

The antitrust laws do not operate in a vacuum or as instruments of interesting and stimulating intellectual exercise their basic purpose is to protect the consuming public, in this instance those paying the rates that support telephone service, from artificially inflated prices. R. Bork, *The Antitrust Paradox*, 61, 90-91, 104, 108, 405 (1978).²⁶⁵

Nevertheless, as indicated, the Department of Justice contends that the Court should not consider the fact that those subject to the Court's decree may be overcharging the public, perhaps systematically, when it is called upon to decide whether to retain in force decree provisions designed to protect the public from such practices.²⁶⁶ To be sure, the Department seeks to distinguish between unreasonable rates in the abstract and such rates arrived at through cross-subsidization. But the objectives of affordable rates and universal service (*see infra*) comple-

ensure the financial health of the local telephone companies, arguing that the interests of the public and the ratepayers in the continued existence of a viable, functioning telephone service are none of the Court's business. Comments at 5-6, 48. The Regional Companies owe their very existence to the decree's purpose to establish them as enterprises for the provision of reasonably priced local telephone service. It would indeed be [sic] an anomaly if, when passing upon requests for dissolution of provisions of the decree, the Court could not even consider the contemplated sacrifice of such service.

²⁶⁵ As Judge Bork stated, "[t]he legislative history of the Sherman Act . . . displays the clear and exclusive policy intention of promoting consumer welfare". R. Bork, *The Antitrust Paradox* at 61.

²⁶⁶ It is quite true that, as the Department of Justice and others contend, the Court has no jurisdiction to determine the appropriate levels of telephone rates. But the Court does have jurisdiction, in this antitrust proceeding, to take the overall effect on ratepayers into account when restrictions imposed for the protection of these ratepayers (as intended beneficiaries of free and fair competition) are sought to be removed.

ment the goal of an industry free from anticompetitive action, and they thus mirror the prohibition on cross-subsidization (*see* p. 553, *supra*); it is the Department's insistence on judicial unconcern regarding unreasonably high rates that is contradictory of antitrust principles.

Interestingly, the view of the Department of Justice was not always so narrow. Five years ago, the Department explained to the public that the decree would be guarding against inflated intra-enterprise transfer prices, thereby to preclude the frustration of public regulation of subscriber rates. Competitive Impact Statement, February 10, 1982, at 39; *see also* Response to Public Comments, May 20, 1982, at 3-6. Similarly, in its briefs and during the trial, the Department claimed again and again, and it placed witnesses on the stand in support of its claim, that the Court *should* consider the interests of the ratepayers to be free from such practices as cross-subsidization which impacted on their rates.

To confuse matters even further, the inconsistency is not merely historical; it exists even now. For contrary to the above-cited statements against consideration of consumer interests in the context of the *retention* of restrictions on the Regional Companies, when the Department argues in favor of a *removal* of restrictions, it finds the interests of consumers to be far more relevant. Thus, its Report states that it had "examined the extent to which the decree restrictions may harm consumers, especially smaller users of telecommunications services," Department of Justice Report at 5, and further that "consumer welfare would be harmed by any failure to modify the restrictions. . . ." Report at 47. *See also* Department of Justice Report at 166; Response at 9, 99.

The protection of consumers is a foremost objective of the antitrust laws, and their protection was a prime objective of this lawsuit when it was brought and prosecuted by the Department of Justice for a number of

years. The Court continues to regard consumer protection as such an objective.²⁶⁷

Second. A related issue is that of the relevance of the goal of universal telephone service. There, too, inconsistencies abound. The Department contends that the decree restrictions may not be maintained to further the universal service goal. Response at 13. Yet Ameritech, its ally on these issues, chastizes the Department for proposing conditions respecting only partial removal of the interexchange restriction on the ground, *inter alia*, that this would "interfere with legitimate social objectives, such as universal service." Comments at 56.

Universal service has been explicitly declared by the Congress to be a paramount national objective,²⁶⁸ and the courts may be expected to avoid taking actions, if that can legitimately be done, that are inconsistent with this objective.

Whatever others may do,²⁶⁹ the Court will continue to decline to regard divestiture as an end in itself, as a

²⁶⁷ As indicated above, the Court's decisions on the core restrictions do not turn on the factors of protection of ratepayers from price gouging or that of universal service. But there should be no misunderstanding regarding the continuing relevance of congressionally-mandated policies. See also *AT & T*, 552 F.Supp. at 149-51.

²⁶⁸ 47 U.S.C. § 151. The Department of Justice repeatedly contends that its proposed removal of the restrictions would not intrude on the regulatory authority of the states. Report at 102. Yet it is noteworthy that the states are making every effort to keep rates for the consumers low so as to foster universal service, see, e.g., Comments of Washington Utilities and Transportation Commission at 9; Comments of the Public Service Commission of Wisconsin at 2-3; an objective that would be undercut by a removal of the core restrictions. The state commissioners are divided on the question of the removal of the restrictions but not on the issue of universal service.

²⁶⁹ *AT & T*, 552 F.Supp. at 224. The Regional Companies did not utter any complaint that this decree interest in affordable local rates

mere deregulatory gesture for the sake of deregulation. Divestiture and the line of business restrictions have as their basic purpose the removal of anticompetitive impediments, to the end that the rates consumers must pay will be reasonable and unimpeded by unfair competition, and that all segments of society, including the poor, the old, the infirm, and those living in isolated and rural areas will in consequence have access to necessary telephone service. This is consistent with the basic purposes of the antitrust laws—purposes that the Court expects to continue to respect.

Third. Insofar as, more specifically, the information services restriction is concerned, in addition to the competitive concerns discussed in Part V, *supra*, that stand squarely in the way of a removal of that restriction, and that alone and without more justify its retention, there is also the threat such removal would pose to First Amendment values that would lead to the same result.

It is a purpose of the First Amendment to achieve “the widest possible dissemination of information from diverse and antagonistic sources.” *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945). The diversity principle has been repeatedly recognized by the Supreme Court.²⁷⁰ Considera-

involved the consideration of improper factors, nor have they expressed any adverse reaction to the Court's action since that time. Again, there was no objection from these companies when the Court noted in 1983 that, in taking action favorable to the Regional Companies with respect to such matters as the Bell name and logo and the availability of Bell System patents, it considered, among other factors, the protection of the principle of universal telephone service. *Western Electric Co.*, 569 F.Supp. at 1091, 1120-21. And of course none of the companies is offering to relinquish those benefits.

²⁷⁰ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795, 98 S.Ct. 2096, 2112, 56 L.Ed.2d 697 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23

tion of the policies embodied in the First Amendment is particularly appropriate here, as it was in the earlier *AT & T* proceedings, because "in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws."²⁷¹

A review of these principles led the Court to conclude in the original proceeding that *AT & T* should be prohibited after divestiture from entering into electronic publishing. Control by one entity of both the content of information and the means for its transmission raises an obvious problem and, in fact, the Court concluded in 1982 that *AT & T*'s control of a large part of the interchange network would enable it to disadvantage and to discriminate against rival electronic information providers and thus to pose a substantial threat to the First Amendment diversity principle. *AT & T*, 552 F.Supp. at 184-85.

The same considerations are applicable to the provision by the Regional Companies of information content, the only difference being that *AT & T* could have displaced other information providers throughout the entire nation while each of the Regional Companies could use its control of the local exchanges to reduce or eliminate

L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 201-04, 76 S.Ct. 763, 769-71, 100 L.Ed. 1081 (1956). As this Court noted in the Opinion accompanying the decree, "the media serve 'one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as possible.'" *AT & T*, 552 F.Supp. at 183, quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945).

²⁷¹ *AT & T*, 552 F.Supp. at 184, citing *FCC v. National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 800 n. 18, 98 S.Ct. at 2114, n. 18.

competition in electronic publishing, or conceivably in publishing generally,²⁷² in its own region only.²⁷³

²⁷² It is not inconceivable that, because of the speed with which news and information can be transmitted electronically, it could, in time, displace much conventional publishing.

²⁷³ There is no merit to the contention raised by some, *e.g.*, BellSouth Response to Comments at 29-30, that the information services restriction infringes the Regional Companies' own First Amendment rights. Like all business establishments, those engaged in, or those that, as the Regional Companies here, consider engaging in, publishing are subject to the antitrust laws. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-98, 98 S.Ct. 1355, 1368-69, 55 L.Ed.2d 637 (1978); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *FCC v. National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 801, 98 S.Ct. at 2115; *Savage v. Commodity Futures Trading Commission*, 548 F.2d 192, 197 (7th Cir. 1977); *United States v. NBC, Inc.*, 449 F.Supp. 1127 (C.D. Cal. 1978); see also Pub.L. 98-549 § 613(b)(1), 98 Stat. 2779 (1984). Moreover, common carriers are quite properly treated differently for First Amendment purposes than traditional news media. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973).

A consent decree was entered into in this case pursuant to the antitrust laws prohibiting the Bell System and its successors from engaging, *inter alia*, in the information services business. The decree did not constitute an infringement of First Amendment rights any more than would have a decree to that effect entered by the Court without consent, after full litigation. Under the decree itself, that restriction may be removed only if the Regional Companies are able to make a certain showing, again mandated by the decree, one that they have not made and could not make at this time.

These companies, which have never been publishers, thus cannot bootstrap their own failure to make the showing necessary for the relief of their obligations under an antitrust decree into an infringement of their First Amendment rights. And of course the decree in this case, which long ago became final with affirmance of this Court's decision by the Supreme Court, which applies to the Regional Companies, *Western Electric Co.*, 797 F.2d at 1087-88, and pursuant to which they received billions of dollars in assets and other valuable rights, is the law of the case, *DeTenorio, supra*, not

Fourth. There is also the question whether the effect of retention or removal of a restriction on the position of the United States in international trade may be considered. The indications are that removal of the restriction on manufacturing, in particular, is likely to injure the position of this nation in that regard, in that the telecommunications equipment market—like the television and automobile markets today—will increasingly become the preserve of foreign-dominated firms. See pp. 561-65, *supra*. The Regional Companies, once again, argue that this is not a matter for judicial concern; yet these same companies have loudly advocated in many forums, including this Court, Bell Atlantic Comments at 5, that the decree stands in the way of an improved American international trade position.²⁷⁴ The companies' position that the Court may not consider the probable deleterious effect of a restriction removal on American foreign trade is not only bad policy; it is also bad law. See *United States v. United States Steel*, 251 U.S. 417, 457, 40 S.Ct. 293, 301, 64 L.Ed. 343 (1920); *FTC v. Great Lakes Chemical Corp.*, 528 F.Supp. 84, 98 (N.D.Ill.1981); *United States v. LTV Corp.*, 1984-2 Trade Cas. 66,133 (D.D.C.), *appeal dismissed*, 746 F.2d 51 (D.C.Cir.1984).

Fifth. Although the Department of Justice insists that the Court's inquiry must be restricted to competitive injury to the exclusion of all other factors, it does find a

only as to the benefits to the Regional Companies but also as to the restrictions. That decree cannot be collaterally attacked in this proceeding. See Stone, *Content Neutral Restrictions*, 54 U.Chi.L.R. 46 (1987); and see also Comments of U S West at 31 n. 28.

²⁷⁴ The Regional Companies' stance is wrong even in that respect. The Court has not denied a single waiver request for international operations. To be sure, the Regional Companies are precluded by section II(D)(2) of the decree from manufacturing telecommunications equipment but, as shown at pp. 560-61, *supra*, American telecommunications manufacturing is stronger today than it was under the monopoly conditions to which the Regional Companies want to return.

cost-benefit standard in section VIII(C) of the decree, when that supports its position. *See, e.g.*, Department of Justice Report at 46. The Court has considered costs versus benefits where this can appropriately be done without undue risk to competitive considerations. *See* Part VIII (information transmission) and Part IX (catch-all restriction) *infra*.

VIII

Transmission of Information Services

Although the Court is denying the requests for removal of the information services restriction insofar as they relate to the provision of information content (Part V, *supra*), a separate analysis is required to determine whether so much of that restriction should be lifted as to enable the Regional Companies to acquire and operate the infrastructure necessary for the transmission of information services generated by others.²⁷⁵ Before considering the competitive issues raised by that suggestion, it is useful to describe first what such action would mean in practical terms.

A. *Videotex Industry*

The term "videotex" refers to a wide variety of easy-to-use interactive data services. "Videotex arranges information in a text or graphic format on a video display

²⁷⁵ Among those who have requested such relief are U S West and Videotex Industry Association. Some intervenors argue that the decree even now permits the Regional Companies to transmit information services. However, in view of the breadth of the information services definition in section IV(J) of the decree, and the inclusion therein of such terms as "acquiring," "transforming," "processing," "utilizing," and "making available," that construction must be rejected. Moreover, as will be seen below, the transmission of such services actually involves the performance of a number of services that by any fair reading of the term "information services" would be included in that definition.

with user input through a keyboard." Huber Report at 1.29 n. 46. Videotex applications cover an entire spectrum of services, ranging from mere database access to such sophisticated services as teleshopping, electronic banking, order entry, and electronic mail. *Id.*

The videotex industry has grown slowly in the United States, particularly with respect to the home videotex market, and consumer-oriented videotex services on a substantial scale remain largely in the future. Several efforts to provide videotex services have failed. In March 1986, Knight-Ridder Newspaper Inc.'s Viewtron service, which provided home subscribers in several markets with news, stock prices, and shopping information, folded without having made a profit. Around the same time, the Times Mirror Company's Gateway videotex services closed down after losing approximately \$30 million. *Washington Post*, "Videotex's Timing Is Questioned," March 20, 1986, section E1.

Approximately five companies in the United States and two independent telephone companies²⁷⁶ are currently offering videotex services. Two of these companies, CompuServe and The Source, have provided videotex services for most of this decade. Trintex, owned by IBM and Sears, is a more recent, multibillion dollar venture offering electronic information and transactional services. General Electric Information Services and Quantum Computer Services each owns a national consumer videotex system that has recently entered the market. The two independent telephone companies, the Chillicothe Telephone Company and the Commonwealth Telephone Company, offer network-integrated videotex services, but only on a very limited basis to very few customers. In spite of the existence of these videotex providers, some of which

²⁷⁶ While Dr. Huber states that the Southern New England Telephone Company also provides videotex, this service does not appear to be integrated with that company's public network. CompuServe Comments at 20-21.

do make available a considerable variety of information services, only about 1.1 percent of United States households use consumer videotex.²⁷⁷

B. *The Experience Abroad*

Videotex is currently being provided in France on a far more extensive scale. The French authorities started what is called the "Teletel" system initially in order to reduce the high cost of paper telephone directories by replacing them with an electronic directory service. Teletel has since grown to provide consumers with more than 4,000 information services through some 2.3 million "Minitel" terminals in homes and businesses.²⁷⁸ The French system distributes both business services and general public services.²⁷⁹ See pp. 589-90, *infra*.

The Minitel is basically a "dumb" or passive terminal, a black and white monitor, far less sophisticated and thus less expensive than an ordinary computer terminal, with a keyboard which may be used to address both the network and the databases maintained by the independent information providers through the network.²⁸⁰ Minitel calls are routed to the information providers over France's Transpac packet-switched²⁸¹ network. The inter-

²⁷⁷ VIA Comments at 8-9; cf. Compuserve Comments at 22.

²⁷⁸ To achieve a level of penetration equivalent to 2.3 Minitel terminals in France, United States consumers would have to have 10 million terminals. By 1990, over six million Minitel are scheduled to be installed in France. U S West Response, App. Tab 1.

²⁷⁹ U S West Memorandum at 20. U S West filed with the Court the January 1987 Teletel catalogue of services called "Listel" that is over 630 pages in length, and describes 2,335 services.

²⁸⁰ A "dumb" terminal simply displays information and acts as a conduit for input commands; more sophisticated personal computers, by contrast, perform some data or command processing functions internally.

²⁸¹ This system involves the breaking down of messages into smaller units, packets which are then individually addressed and

face between the regular telephone network and Transpac is provided by videotex access points (VAPs) widely dispersed throughout that network. The French state-owned telephone company, the Direction Generale des Telecommunications (DGT), owns the VAPs. However, all information content, as well as information storage, indexing, retrieval, and presentation, are controlled by the information providers,²⁸² not the telephone company; the DGT provides basically only a content-neutral transmission and switching conduit.²⁸³ The telephone company also bills users directly for both transmission and provider services, and it reimburses the providers for a portion of the fees.²⁸⁴ The French government controls the Teletel system through the DGT, and it also subsidizes the system by giving away the Minitels free to all households.²⁸⁵

Videotex is also available, but on a much more limited scale, in Japan and, to some extent, in Great Britain.²⁸⁶ The Japanese telephone company functions as a hardware-software vendor to a number of local emergency medical information systems that monitor, among other things, the availability of hospital beds and blood and serum inventories. Huber Report at 1.29 n. 47, Table

routed through the network. Similar service is available in the United States from GTE Telenet and Tymnet, but not from the Regional Companies.

²⁸² ANPA Comments at 29.

²⁸³ However, the DGT does provide an electronic telephone directory service.

²⁸⁴ ANPA Comments at 29-30.

²⁸⁵ According to reports, albeit from interested parties, there is no governmental subsidy for the French Teletel service, as the French telephone company expects to recoup its entire investment by 1990 or 1991. Presentation of Intelmatique, U S West Reply, App. Tab 2, at p. 5.

²⁸⁶ ANPA Comments at 16 (*citing* Department of Justice press release, at 9-10 (February 12, 1987)).

G.18. The Japanese Automated Meteorological Data Acquisition System collects weather data continuously from 1,400 reporting stations, Huber Report at Table G.18; a voice-mail system was instituted in Japan late in 1986, Bell Atlantic Comments at 54 n. 113; and Nippon Telephone & Telegraph makes available to customers a number of dial-up services, including news, weather, golf and ski conditions, travel, insurance, taxis, hotels, cooking, music, and English-language services. Huber Report at Table IS.21. Like the French company, the Japanese telephone company functions essentially only as a supplier of conduit, not of content.²⁸⁷

C. Importance of Widely-Available Information Services

As indicated, no videotex service on a similar scale exists in the United States. Before inquiring into the reasons therefor and into practical means for remedying the relative scarcity of such services without at the same time creating the risk of anticompetitive actions, it is appropriate to consider first whether and why the wide availability of information services through videotex might be beneficial.

It is a cliché to state that we live in an Information Age, but it is also true. Information is today as central to the service economy which increasingly prevails in this country as iron and coal were to England around the turn of the century. Whatever causes the more efficient, rapid, inexpensive dissemination of specifically needed and requested information²⁸⁸ to all segments of the population,

²⁸⁷ Reply Comments of ANPA at 7.

²⁸⁸ The United States of course does not suffer from a paucity of information. Newspapers, television and radio stations and networks, cable services, magazines, libraries, and other information sources exist in number and quality unmatched elsewhere. Videotex would fill a distinct niche, however, in that it would enable a participant to acquire specific information at a time when he needs or wants it, and it would permit him to do so without time-consuming, difficult research efforts.

is likely to give this nation and its economy a significant advantage over countries not similarly equipped. More specifically, affordable videotex—the instantaneous availability to millions of Americans of needed information at low cost—could be expected to benefit the economy by providing increases in efficiency in information management and hence also in productivity. Outside the economic realm, broad and relatively inexpensive videotex would, of course, offer significant social benefits.

Without attempting to be exhaustive, the following lists some of the more obvious videotex-related economic services that exist elsewhere and that might be made available in this country: (1) in banking, videotex could give customers direct and immediate account information and fund transfer capability; (2) in brokerage, there could be instant evaluation of current portfolios and access to alternative investment opportunities; (3) with respect to customer service by a variety of business enterprises, arrangements could be made for immediate access to information about outstanding balances, order fulfillment, accrued interest, and the like; and (4) with respect to shopping services, videotex could provide direct and immediate access to the prices and descriptions of a wide range of products and services that could be purchased electronically.²⁸⁹

²⁸⁹ At the present time, in order to obtain access, for example, to a stock quotation through an information service, the consumer must go through the following steps:

(1) obtain a personal computer, a modem and communications software;

(2) research which videotex system operator offers the quotation service of interest;

(3) presubscribe to the system, generally for a minimum monthly fee;

(4) learn which value-added communications networks the system operator uses, and the closest telephone number for the system;

(5) obtain from the system its communications access code and a personal identification number;

Outside the economic sphere, videotex is used in France, and could presumably be applied in the United States, for such services as (1) travel information, restaurant reviews and reservations, hotel and rental car information, and airline schedules; (2) instantaneous access to ticketing for sports, musical, cultural, and entertainment events; (3) information concerning meetings of associations, including schedules, performers, and speakers; (4) social messaging; (5) access to federal and local governmental information; (6) language instruction; (7) reprints of newspaper and magazine articles; and (8) employment services.

The Court obviously does not and cannot know which of these or other services would be offered in this country, and, if offered, would prove useful or desirable here. The only question before the Court is whether the decree restriction on the Regional Companies should be lifted in part so as to permit the participation in the information services market of those with an economic incentive and the requisite interest do so.

D. *Large-Scale Videotex in the United States.*

There is a variety of opinion on the question of why videotex services have not grown in the United States²⁹⁰ as they have in France and to a lesser extent in Japan and Britain. Some, who oppose the lifting of the restriction, suggest that there is simply a lack of consumer de-

(6) dial the system's local number and enter the appropriate codes at the appropriate times; and

(7) learn the unique navigation structure of the information network and the unique search structure of the information provider.

VIA Comments at 11; *see also* Motion of U S West at 28.

²⁹⁰ As several information service providers correctly point out, and as is noted above, many such services do exist in this country, but what is missing is the easy access that is provided elsewhere by the French Teletel, and therefore a mass market.

mand²⁹¹ caused by the difficult technology and the expense involved in operating home terminals²⁹² as well as low consumer awareness, difficult accessibility, and insufficient service relevance.²⁹³ Others believe that the foreign advantage lies in the basic fact of government ownership of the telephone network and the subsidy it provides for allied services.²⁹⁴

The French government's subsidization of the terminals would be difficult to duplicate here either on a government-subsidy or a telephone company-subsidy basis.²⁹⁵ It is unlikely, however, that the cost of the terminals—now estimated at between \$100 and \$150 but probably less on an mass market basis—would be an insuperable obstacle if information services could otherwise be distributed to consumers on a broad scale and at reasonable cost. The other problems—consumer awareness, accessibility of service—could presumably be solved by a service that was properly marketed and became available to a substantial segment of the public.

No one knows, of course, which of these problems is critical, and no one knows whether information services would be accepted by both providers and consumers on a sufficient scale to render it economically feasible as well

²⁹¹ *New York Times*, "Videotex Players Seek a Workable Formula," March 25, 1986, section D, page 1, column 4; Compuserve Comments at 15.

²⁹² *Business Week*: "Trinitex: A Rocky Star, An Uncertain Future," December 1, 1986, page 122; *see also* VIA Comments at 10.

²⁹³ VIA Comments at 10.

²⁹⁴ *But see* note 285, *supra*.

²⁹⁵ However, if this were a necessary prerequisite to the establishment of a system that clearly would be useful and could be made to pay for itself—as some claim is probable (*see* note 285, *supra*)—it may be that such an initial subsidy would be forthcoming.

as socially useful.²⁹⁶ Indeed, no one could ever know the answer to these questions unless legal obstacles to the provision of the services are removed.

After considering the subject in some detail and with great care, the Court has become convinced, first, that, if the authority of the Regional Companies is carefully limited, the risk of anticompetitive action by these companies, while not insignificant, is, on balance, outweighed by other considerations (*see infra*); second, that the broad scale and the reasonable cost criteria necessary for a successful system can be met only by permitting the Regional Companies to provide the necessary infrastructure components for efficient videotex services on an integrated basis;²⁹⁷ and third, that it is probable that a well-run, adequately publicized system could perform a useful service, and that it might attract a sufficient number of subscribers so that it could operate on an economically sound basis.²⁹⁸

²⁹⁶ American Newspaper Publishers Association believes that such services have blossomed whenever one or more of the following factors has generated a willingness by the market to pay for the service: (1) a need for highly current information; (2) a need for automated, intensive searches among large amounts of indexed material; and (3) a need to manipulate information, mathematically or otherwise, as well as to obtain information. Comments at 21.

²⁹⁷ The ability of the Regional Companies to engage in low-level network functions on an integrated basis, such as those described below, would result in more efficient provision of those services by decreasing the cost and increasing the accessibility of those services. This, in turn, could foster a mass market for videotex services.

²⁹⁸ The consensus to that effect reaches all the way from U S West, a Regional Company, to the American Newspaper Publishers Association, a publishing association.

Not everyone agrees, of course. For example, ADAPSO states that the French experience is meaningless in American terms, and that the United States has even now the world's largest, most successful, most sophisticated information services industry. Comments at 46-48. Whether or not that assessment is correct—and

E. *An Economically Sound System*

If the Regional Companies operated the key infrastructure components, the expense associated with the provision of videotex could be reduced substantially and the services themselves would be more readily accessible. See Affidavit of Dr. Almarin Phillips submitted on behalf of U S West; Affidavit of Professor Jerry A. Hausman on behalf of Pacific Telesis. More specifically, the data indicate that Regional Company ownership of "gateway" facilities similar to French VAPs would decrease the cost of providing videotex.

Gateways²⁹⁹ would permit the conversion of the asynchronous signals that an inexpensive "dumb" terminal sends and receives to more efficient X.25 packet signals. Since asynchronous transmission is much more expensive and much slower than X.25 packet transmission, wide dispersion of the gateways would decrease the duration of asynchronous transmission and hence overall transmission costs. Such a reduction in transmission costs may be expected also to reduce substantially the cost of the videotex service to the consumer, and the increased demand generated thereby presumably would, in turn, increase the number of information voices available to the public.³⁰⁰

Possible alternatives are not similarly attractive. If the gateways did not perform these conversion functions, they would have to be performed either by the individual

this depends primarily upon what is being counted and how—there would appear to be no question that more efficient distribution of the services would significantly increase their availability and hence their usefulness.

²⁹⁹ As used herein, the term "gateways" is limited to facilities, similar to the French VAPs, that are described below. It does not include other facilities that under other circumstances may be included within the meaning of that term.

³⁰⁰ If the network itself performed certain gateway services, even small data base providers could afford to compete in the information services market.

terminals or by the various providers of information. Conversion by the terminals would necessarily increase significantly the required sophistication and consequently the cost of these terminals. If prospective users would have to spend a substantial amount for full-fledged computer terminals without any assurance that the services to be provided will actually be useful to them, the opportunities for the creation of a true mass market would be substantially reduced.

On the other hand, if the provision of the gateway functions were left to the individual providers of information, it is doubtful that these providers would disperse the gateways as widely as would the Regional Companies, for the simple reason that such dispersion would increase their packet switched transmission costs, as well as the customers' costs of accessing the desired information services.³⁰¹ Here again, then, the economies of the system would probably be such that it would not grow as it should if this country is to benefit from a modern, comprehensive information, service.

What all of that indicates is that the Regional Companies have built-in incentives not available to others to disperse and multiply gateway facilities³⁰² and that the relatively extended transmission to such facilities would save money both to the information providers and to consumers.³⁰³

³⁰¹ Relatively long asynchronous transmission of the signals would also have the drawback of impeding the transparency of the communication between providers and consumers.

³⁰² Such dispersal would mean income to the Regional Companies since it would necessitate the wide transmission of information over Regional Company lines for which they would, of course, be paid.

³⁰³ As explained *infra*, and for the reasons there elaborated on, the Regional Companies should additionally be enabled to perform certain billing management functions, and to furnish limited introductory information services. If this were done, the otherwise

F. *Necessary Infrastructure Components*

For the reasons stated, it appears that it may, on balance,³⁰⁴ be appropriate to permit the Regional Companies to provide an infrastructure for information services. It is obviously essential, however, that the necessary infrastructure components be defined with as much detail as possible in order to avoid conferring upon the Regional Companies the authority to market content-based information services, a result that would prohibitively increase the risk of anticompetitive conduct.³⁰⁵

As indicated, the infrastructure necessary for the transmission of information services consists primarily of various low-level gateway functions that do not involve control of or interaction with information content. A gateway would operate as a Regional Company interface or connection point between consumers and information service providers, that is, as an interconnecting data transport system, accessible through a single, preferably truncated, telephone number.

The gateway functions, analogous to the functions performed by the French VAP, consist of (1) data transmission, (2) address translation, (3) protocol conversion, (4) billing management, and (5) introductory information content.³⁰⁶

The following examination of the scope of the various infrastructure components details how they would operate and how they might be expected to achieve the requisite efficiencies.

complex billing process would be simplified, and the consumer could access the desired information service by using only one telephone number, with separate passwords for each provider.

³⁰⁴ See Subpart I, *infra*.

³⁰⁵ See generally Part V, *supra*.

³⁰⁶ See also Huber Report at 6.16, Table IS.10.

1. *Data Transmission*

Data transmission functions include signal demodulation; error rate measurement; and the generation of characters on the user screen. The demodulation of signals coming from consumers is an essential transmission service necessary to the performance of "telecommunications" functions as defined by section IV(O) of the decree. The measurement of the error rates on the line is a part of facilities testing for "information access" under section IV(I) of the decree. Neither of these functions involves the manipulation of the content, or indeed the form, of the information sent or received, and neither requires a specific amendment of the decree, or poses a threat to competitive parity.

The generation of characters that appear on the terminal screen constitutes an echoing of consumer-generated keystrokes for the purpose of confirming successful reception as part of the transmission function. Although it is asserted by some that provision of this type of service could affect the content of the information sent or received—for example when the format of the information provider's computer application, which uses color as a necessary component to the interpretation of the message sent, is changed so that the receiving terminal, which has only a "highlight" and "shade" capability and no color capability, can receive that message in a meaningful manner—the degree to which such a transformation could affect content is insubstantial. In the judgment of the Court, performance of this function by the Regional Companies will not create any significant opportunities for anticompetitive conduct.

If the Regional Companies are permitted to provide these services, much of the need for sophisticated hardware and software at the user's end of the system otherwise necessary for the achievement of access to information services would be obviated: the network itself would

be performing functions otherwise performed by the user's more sophisticated computer.

2. *Address Translation*

Through address translation, the consumer will be enabled to use an abbreviated code or signal provided to him in order to access the information service provider in lieu of dialing the telephone number of the desired provider.³⁰⁷ Translation of the consumer's request for service in this manner would obviously facilitate accessibility of the system. Performance of this function by the Regional Companies likewise involves only a minimal manipulation of content, and it, too, poses no significant risk of anticompetitive conduct.³⁰⁸

3. *Protocol Conversion*

Protocol conversion facilities undertake electronic translation in order to facilitate the communication between information service providers. They perform this task by altering and reconfiguring message content at the machine level, for example, by converting the asynchronous signals that a "dumb" terminal sends and receives to the more efficient X.25 packet signals. Protocol conversion services are essential, low-level network support systems. Huber Report at Table IS.10.

³⁰⁷ In the French VAP, this service consists of the translation of a mnemonic code into the telephone number of the desired information service provider.

³⁰⁸ While it has been argued by some that the Regional Companies are entitled to provide this service even now under the decree as part of the permissible "forwarding or routing" functions of "information access" *see* section IV(I) of the decree, the Court has concluded otherwise, particularly since section IV(F) prohibits interexchange routing. Accordingly, the legality of the performance of this function will require an appropriate amendment of the decree. In any event, provision of this service by the Regional Companies, in conjunction with the other infrastructure components described herein, is a necessary component in the provision of a impetus for growth of a mass-market for videotex services.

Provision of these conversion functions by the Regional Companies is necessary to take advantage of the decreased transmission costs described above. As there noted, independent providers would not have the incentive to disperse the conversion facilities on a wide basis since such dispersion would increase their packet switched transmission costs.³⁰⁹

Protocol conversion, then, is a key infrastructure component necessary to the development of a mass-market for videotex. Some simple forms of protocol processing do not involve any changes in form or content of the information sent, and their performance by the Regional Companies poses no risk whatever. However, a sophisticated and effective system of information transmission requires also that the network perform those protocol conversion functions that are necessary to enhance transparency of communication between consumers and information service providers, and the Court is prepared to grant a modification of the decree to meet these requirements. On the other hand, additional protocol conversion services that manipulate content beyond that which is necessary for the transmission of services, would raise significant anticompetitive concerns and, since they are not essential to the operation of a videotex system, the performance of such services will not be authorized. It is expected that the proposed orders and memoranda submitted to the Court (*see* p. 597, *infra*) will describe what the particular parties or intervenors regard as necessary and unnecessary protocol conversion services.

4. *Billing Management*

The current videotex systems require presubscription: the consumer must furnish his name and address, telephone number, a credit card number, and other similar

³⁰⁹ Limited dispersion would not only preclude the possibility of decreased transmission costs, but it would also constrict the transparency of communication between the consumers and providers.

information, as required by a particular information service provider, in exchange for a password that must be retained and entered with each access as a prerequisite to the receipt of data from the provider. This presubscription process obviously decreases the accessibility and distribution of videotex, inasmuch as the consumer's need or desire for information is usually immediate, and often cannot await the grant of special permission from the appropriate provider. Moreover, the presubscription process increases the providers' start-up costs.

The Regional Companies' role as intermediaries between information service providers and consumers, and their built-in ability to charge accurately the calling telephone number for services rendered, suggests that these companies are in a unique position to provide certain billing management functions that would obviate the need for a presubscription process. Further, if these functions were assumed by the Regional Companies, it would obviate the necessity for separate, individual provider-operated management information and billing systems, thereby eliminating a significant entry barrier for small entrepreneurial providers. In short, the vesting of billing services in the Regional Companies is an important, even essential element in the process. It is also one that does not present significant competitive issues.

A more difficult problem is presented by the question of consolidated billing. There is no objection *per se* on anti-competitive grounds to consolidated billing, that is, the mailing by a Regional Company of a single bill covering both its own fees and those of the particular providers. However, if the Regional Companies were permitted to operate a billing arrangement in conjunction with the information service providers that amounted, in effect, to the sharing of revenue, a strong opportunity would be created for anticompetitive conduct, for that type of arrangement would give the Regional Companies an incentive to discriminate in favor of those providers whose

revenues it shared. That incentive, coupled with the Regional Companies' undoubted ability to disadvantage competitors, would be enough to raise precisely the concerns that led to the adoption of the decree. Accordingly, while these companies may be permitted to provide consolidated billing arrangements, they will not be permitted to enter such arrangements that provide for the sharing of revenue.³¹⁰

5. *Introductory Informaiton Content*

The provision of limited, introductory information content by the Regional Companies is likewise essential to the operation of a practical, efficient system. It is also likely to promote a mass-market for consumer videotex, for it would both facilitate use of the system and permit quick and easy access to the various information providers. However, here again, in order to avoid the creation of an incentive and ability to engage in anticompetitive behavior, this introductory content must be strictly limited to (1) the display of a welcoming page and (2) provider listings.

A welcoming page could advise the consumer of the billing arrangement that was established for a particular information service, and it would provide for the prompt entry of the code or the name of the desired information service provider. Neither of these should cause any competitive problems.

A provider listing could, for example, contain in addition to the providers' names, addresses, and telephone numbers, their business, product, or service categories. With this information as a database, the Regional Com-

³¹⁰ The Fraench Teletel system instituted a "kiosk" billing system in 1985. Under this system, the telephone company bills the consumer on a flat-rate-per-service basis. Consequently, the consumers of information services pay on a per minute basis for the information services that they use. This kind of system would seem to implicate revenue sharing and will not be permitted here.

panies could establish systems which would allow the consumer to search in any of these categories. The companies might wish also to cross-reference the names of the providers, their codes, and the like. Such a cross-reference would not only give broader exposure to the various available providers but it would also facilitate consumer access to the services.

However, service menus, which some of the Regional Companies are seeking, are in a different category. Menus of information services and options within those services are the essential means for navigating about that system, that is, for directing the consumer in its use, such as in obtaining or transmitting the desired information or in performing certain transactions. Menus are a matter of editorial control, specifically tailored by the particular information provider, and as such they tend to be closely interrelated with information content. If the Regional Companies could furnish such menus, there would be a breach in the boundary between information services needed for transmission that only insignificantly affect content, and those that do constitute content and accordingly establish opportunities for anticompetitive conduct. On this basis, the provision of the menu service cannot be permitted consistently with the basic structure and purposes of the decree.

G. *Electronic Directory Service*

Several intervenors claim that the provision of electronic directory services by the Regional Companies is a necessary component of the infrastructure, and that it, too, should be permitted.³¹¹

The basic rationale advanced in support of this assertion is that the consumers will become better acquainted with videotex services generally through use of the electronic directories. That rationale, while it does contain a

³¹¹ See, e.g., VIA Comments at 10.

grain of truth, is not adequate to support removal of the information services restriction with respect to the provision of electronic directory services generally.

The Regional Companies are currently permitted to compile and distribute "Yellow Pages" directories. If they were also allowed to provide their electronic counterpart, they would plainly have the incentive and ability to discriminate both against competing providers of directory services and against the publishers of classified and other advertisements.³¹²

As the Court indicated in 1982, with respect to the prohibition on electronic publishing by AT & T, it is too easy and too tempting for a company engaged in both the generation of information, whether political or commercial, and its transmission, to discriminate against competitors who lack the ability to exercise the transmission function. In view of the time-sensitive nature of most such material, discrimination activity by a Regional Company could profitably include the practice of giving priority to its own publishings, and that of using for its own ends information learned in the course of transmitting the data generated by others, to cite just two examples that come readily to mind. *See also AT & T*, 552 F. Supp. at 181-82. For these reasons, the prohibition against Regional Company provision of electronics "Yellow Pages" directory services will continue in force. *AT & T*, 552 F. Supp. at 189-90 n.239 & n.253.

³¹² Yellow Page-type advertisements transmitted and published electronically could easily be updated weekly or even daily, and on this basis they could and no doubt quickly would compete directly and on favorable terms both with current-type newspaper advertisements, and with those who would use the new information network to publish their own electronic advertisements. Although, for the reasons stated, Regional Companies cannot be permitted to enter this market, there is no reason why others—whether or not they are now in the publishing business—could not do so.

However, since there would appear to be no economic basis for anticompetitive activity in connection with the production of "White Pages" directories, there is no reason under the decree why the Regional Companies could not offer, in whole or in part, such directories in electronic form. Such an option will accordingly not be prohibited.

H. *Terminals*

The manufacture of terminals is not a necessary component of the infrastructure to be provided by the Regional Companies.³¹³ The technology for Minitel-style "dumb" terminals is currently available in the United States.³¹⁴ Furthermore, the penetration of personal computers in the United States is proportionately larger than the penetration of Minitel terminals in France, for there may currently be as many as 26 million personal computers in service in the United States that "could readily tap into a videotex system."³¹⁵ Accordingly, and for the reasons discussed in Part IV, *supra*, the Court will not remove the decree prohibition on the manufacture of terminals. However, the Regional Companies may, of course, provide, that is, sell terminals manufactured by others.³¹⁶

I. *Could the Transmission of Information Services By the Regional Companies Impede Competition?*

The discussion above, while suggesting that the danger may not be large, does not provide a final and definitive answer to the question whether the transmission of infor-

³¹³ Indeed, even the French telephone company does not manufacture the Minitel.

³¹⁴ VIA Comments at 10.

³¹⁵ Motion of U S West at 22-23; Compuserve Additional Opposition at 11.

³¹⁶ Section VIII(A) of the decree permits the Regional Companies to market CPE.

mation services as described above could form the basis for anticompetitive action. The Court is mindful in this regard particularly of the facts (1) that the Regional Companies may be expected, based on past experience, to seek to use any authority granted to them to transmit information services as a springboard to the furnishing of information content, and (2) that a broad videotex operation has never been tried in the United States. The experience of foreign countries is not particularly instructive with respect to competitive questions, since the telecommunications networks abroad are generally government-owned and controlled, and since, in any event, anti-trust considerations play little or no role there. The experts cited by the various parties and intervenors differ to an extent in their understanding of such subjects as what constitutes transmission or content,³¹⁷ and they differ also with regard to the degree of risk to competition that would exist if the Regional Companies were afforded an exception from the information services restriction so as to allow them to provide transmission services.

The Court is thus faced with the dilemma of either authorizing entry of the Regional Companies into the transmission market without complete certainty regarding the anticompetitive considerations or awaiting clarification of the various technical, logistical, and economic problems until a definitive judgment can be reached.³¹⁸ The Court has decided to opt in favor of the former, on the following basis.

As stated in Part VII, *supra*, the Court has in the past taken into account well-defined public policies and bene-

³¹⁷ Some, *e.g.*, Tymnet-McDonnell Douglas Network Systems, argues that it is inherently impossible to draw rational lines between content-related and non-content-related information services. Memorandum at 13-22.

³¹⁸ As stated above, unless the Regional Companies are allowed to enter this field, and actually operate within it, the requisite certainty may never be achieved.

fits, in addition to the effect on competition most narrowly construed, in approving the decree, in interpreting it, and in passing upon motions and other requests from the parties. Further, as there stated, notwithstanding the contrary views of the Regional Companies and the Department of Justice,³¹⁹ the Court has no doubt of its authority to continue to do so, where there is no inconsistency with the antitrust laws or the factors underlying the approval of the decree as expressed in the Opinion which effected such approval.

Accordingly, the Court will, in the present context, once again take into account values in addition to those stemming exclusively from an environment free of anti-competitive activity, in this case the benefits to the American public from expanded, intelligent, widely available information services transmitted through an infrastructure operated by the Regional Companies. The divestiture of the Bell System, and the decree which brought it about, were not mere exercises in abstract reasoning: they had as their fundamental purpose the promotion of competition in the telecommunications market, to the end that the American public, including the American consumer, might benefit from today's and tomorrow's telecommunications technology in this information age.

The wide dissemination of information services is a key ingredient in that design. As indicated, the French information services scheme permits individual citizens to secure an enormous number and variety of information services with ease and at reasonable cost. While the two nations are not comparable in many other ways, they are surely not dissimilar in regarding as a positive value the access of the citizenry to a variety of sources of information. To the extent that this objective can be promoted

³¹⁹ The Department has, however, acknowledged the legitimacy of a cost-benefit test. See p. 587, *supra*.

through a relaxation of the information services restriction in the decree along the lines outlined above, the Court is prepared to do so.

For the reasons stated, the Court will exempt from the information services restriction the transmission of information generated by others in the manner and to the extent described above. However, in light of the not fully complete descriptions in the record of the various ingredients that are necessary to an information transmission system, juxtaposed against the need for precision (*see pp. 596-97, supra*), the parties and interested intervenors are invited to submit proposed orders, accompanied by memoranda, consistent with this Opinion, detailing the necessary ingredients with greater particularity.

IX

Non-Telecommunications Services

Section II(D)(3) prohibits the Regional Companies from "provid[ing] any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." *AT & T*, 552 F.Supp. at 228. This catch-all restriction prohibits the companies from participating in "unrelated businesses" in which they might have the ability to obtain improper competitive advantages by leveraging their control over the local monopolies. *Id.* at 195 n. 267.

Unlike the core restrictions, the section II(D)(3) prohibition was not imposed on the basis of any specific evidence of anticompetitive activity in non-telecommunications markets by AT & T or its subsidiaries, nor could it have been: by virtue of the 1956 consent decree, the Bell System was not engaged in non-telecommunications business enterprises. Section II(D)(3) rested instead on the proposition that, when an entity with a significant telecommunications monopoly enters some other, com-

petitive business, there is both an incentive and an ability to act anticompetitively. The restriction also reflected the notion that, by limiting the Regional Companies to traditional local exchange services, the goal of the provision of efficient, economical telephone service would be furthered. *Western Electric Co.*, 592 F.Supp. at 855-58.

Whatever the theoretical basis for the inclusion of this restriction in the decree, the Court made it clear that a Regional Company could petition for removal of that restriction, and the Court would grant that petition—it would “waive” the restriction—if “there was no realistic possibility of abuse of monopoly power.” *AT & T*, 552 F.Supp. at 195 n. 267.

The Court assumed at the time of the entry of the decree that the Regional Companies would not have any substantial interest in entering unrelated businesses, and that the line-of-business waiver requests to enter non-telecommunications markets would therefore be rare.³²⁰

That expectation turned out to be erroneous. Instead of the occasional request for a waiver for the operation of a cafeteria in a telephone company building, dozens upon dozens of far-reaching requests were filed almost immediately after divestiture. The Court accordingly established procedures for the handling of waiver requests, involving initial screening and recommendation by the Department of Justice, with opportunities for opposition or other comment by interested parties, prior to final court decision. *Western Electric Co.*, 592 F.Supp. 846. Since 1984, the Department of Justice has reviewed and favorably recommended over one hundred sixty waiver requests, and the Court has granted every one of these requests. *AT & T Comments* at 114.³²¹

³²⁰ See *Western Electric Co.*, 592 F.Supp. at 853 n. 11, 858.

³²¹ The Court has denied only requests that were filed ostensibly pursuant to section II(D)(3) but that actually presented attempted incursions by a Regional Company into businesses covered by one

However, the Court has typically imposed four conditions as part of the grants of the requests: that the new competitive business be operated through a separate subsidiary; that the subsidiary obtain its own debt financing on its own credit, as distinguished from that of the Regional Company's telephone affiliate; that the total estimated net revenues for all the non-telecommunications activities engaged in by a Regional Company pursuant to waiver not exceed ten percent of that company's total net revenues; and that the monitoring and visitorial provisions of section VI of the decree shall apply to that subsidiary.

The purposes sought to be accomplished by these restrictions included *inter alia* the facilitation of the policing of the prohibition on cross-subsidization; protection, to the extent possible, of the financial soundness of the local telephone companies; making certain that the Regional Companies maintained adequate resources to complete implementation of equal access; and attempting to ensure that the Regional Companies would not neglect and undermine local telephone service by a concentration on and the allocation of resources to entirely unrelated businesses. *Western Electric Co.*, 592 F.Supp. at 870-72.³²²

of the three core restrictions. Further, when feasible, the Court imposed conditions on the granting of other requests in order to prevent such incursions. *See, e.g.*, Orders dated August 22, 1985 (U S West) and March 13, 1986 (Ameritech) (financial service waivers conditioned to prevent Regional Company financing of equipment manufacturers, interexchange services, and information services); Opinion dated February 26, 1986 (Pacific Telesis waiver to acquire Communications Industries, Inc., conditioned on divestiture of CI's equipment manufacturing and telephone answering service operations).

³²² In some cases, in response to concerns of interested persons that have commented to the Court or the Department of Justice, the Regional Companies have also accepted additional conditions, such as to prevent cross-subsidization through asset transfer. Interestingly in light of its current attitude, in July 1984, at the

The Department of Justice and the Regional Companies now request that the non-telecommunications restriction be entirely removed. Necessarily, this would require that the waiver process also be discarded. It is convenient, for purposes of analysis, to distinguish between the removal *per se* of the restriction and the disappearance of the conditions that the Court has customarily attached to waivers with respect to entry into non-telecommunications markets.

It seems fairly clear that the restriction itself may safely be removed pursuant to section VIII(C) of the decree. Almost all of the parties and intervenors that have addressed the section II(D)(3) issue have concluded that there is no substantial risk that Regional Company participation in non-telecommunications business would permit leveraging of exchange monopolies.³²³ That conclusion is also supported by the experience that, following review by the Department of Justice and the Court, every one of the waivers requested in this field was granted.

More problematical is the cross-subsidization issue that the Court sought to address in part by the conditions it attached to the waivers. There is no question but that the removal of the restriction on entry of the Regional Companies into non-telecommunications markets does raise the concern that their operations in these markets will be subsidized by revenues extracted from the rates that are being paid ostensibly for local telephone service. Indeed, as discussed in Part VII, particularly pp. 581-83,

time of the formulation by the Court of the four general conditions discussed in the text *supra*, the Department of Justice recommended that the Court impose eight much more far-reaching conditions with respect to all waivers. *Western Electric Co.*, 592 F.Supp. at 870.

³²³ See, e.g., National Association of Regulatory Utility Commissioners, *Summary Report on the Regional Holding Company Investigations* at 5 (Sept. 18, 1986); see also *Western Electric Co.*, 592 F.Supp. at 853.

supra, notwithstanding various restrictions and conditions, such diversions appear to be taking place even now.

As against this continuing problem must be weighed that (1) there is little demand from potential competitors for retention of the restriction; and (2) the relative paucity of joint and common costs between exchange operations and non-telecommunications ventures renders it more difficult to cross-subsidize on a continuing basis in large amounts in this area than in telecommunications-related markets.

In the opinion of the Court, while the issue is by no means open and shut, the balance of factors favors the removal not only of the restriction itself but also of the conditions heretofore attached to restriction waivers. That balance is achieved in part by several public policy or cost-benefit factors (Part VII-B): (1) the waiver process with respect to this non-telecommunications field places a substantial burden on Regional Company planning and decision-making; and (2) this process involves the Court on a fairly significant scale in Regional Company business decisions when the final outcome, at least thus far, has always been the issuance of a waiver; and (3) if the restriction itself has become obsolete, the retention of conditions becomes somewhat unrealistic.

Absent weightier competitive considerations than are present here and now,³²⁴ it is appropriate, therefore, that these companies be freed of detailed judicial oversight of their decisions. There is, of course, independent phil-

³²⁴ There is, to be sure, also the somewhat more amorphous risk that the Regional Companies, in their zeal to diversify, will neglect the relatively pedestrian, regulated telephone operations, and concentrate their resources and managerial skills instead upon more glamorous, albeit more speculative, business opportunities. At least one of the usual waiver conditions was designed to deal with this issue. However, it is at least conceivable that the FCC, possibly with a mandate from the Congress, will see its way clear to address this problem should it assume substantial significance.

osophical utility in a departure of a judicial body from the adjudication of matters that are not likely to present substantial problems in terms of compliance with the antitrust laws.³²⁵

For these reasons, the Court will remove the restriction embodied in section II(D)(3) of the decree on the entry of the Regional Companies into non-telecommunications ventures. Consistently with that decision, the four conditions heretofore imposed as part of past waivers of the section II(D)(3) restriction will also be dissolved.

X

Conclusion

The purpose of the decree in this case is not to assist one company or another, nor is it to promote abstract antitrust theory or divestiture as part of some broad ideological scheme. Rather, it is the decree's purpose to allow consumers to reap the benefits of competition in telecommunications that competition has generated for a hundred years or more in a myriad of other fields. It is with that basic philosophy in mind that the Court has approached the present set of motions, requests, and reports.

A. *Core Restrictions*

Although it may be difficult to recall this now, the fact is that for thirty years prior to 1984, the Congress, the courts, the Federal Communications Commission, and state regulators wrestled with the problem of what to do about the Bell System monopoly, its arrogance in dealing with competitors and consumers, and its power to shut

³²⁵ Some have suggested, *e.g.*, Computer and Business Equipment Manufacturers Association at 28, that termination by this Court of the waiver process could result in the filing of a great number of separate antitrust suits throughout the land. For the reasons stated, the Court does not believe it likely that many meritorious antitrust actions will develop.

out competition. One Department of Justice lawsuit was filed and aborted; regulators issued edicts that were largely ignored; Congress investigated but could not come to a decision; and a second federal lawsuit and several private actions were filed in the courts where they remained pending for a number of years. In the meantime, competitors languished and the American ideal of free and fair competition remained absent from the telecommunications industry.³²⁶ When ultimately the decree that governs this case was negotiated between the parties and approved by the Court, it resolved the problem of claimed monopolistic conduct in telecommunications by going to its root.

That root was the control by the Bell System of the local telephone switches—in which it had a monopoly—and its simultaneous presence in several other markets (long distance, telecommunications manufacturing, and information services)—in which it had competitors. The competitors in each of these markets were suffering from an insuperable disadvantage: they could reach their ultimate customers only by connecting their circuits and products to the Bell System's local switches, the only technologically available avenue to the homes, offices, and factories of America where the individual telephone instruments are located. It followed that these competitors were at the mercy of the Bell System's managers, who could with ease discriminate against them by such practices as delaying interconnections, providing inferior connections, charging exorbitant prices, or refusing to attach competitors' products altogether. The Bell System was also able to subsidize its competitive products with funds syphoned off from the monies paid in by the ratepayers, thus to undercut the prices charged by independent firms and drive them out of business.

The quite predictable result was that no independent long distance, manufacturing, or information company

³²⁶ See generally, Part I, *supra*.

ever really got off the ground: for practical purposes the Bell monopoly remained just that. Since exhortations, regulations, and orders requiring a cessation of the Bell System's activities had proved fruitless, the remedy adopted in the decree, as simple as the problem itself, had but two basic aspects: first, the divestiture from AT & T of its local monopoly affiliates (thus forcing AT & T's other enterprises, all competitive, to stand or fall on their own); and second, an order prohibiting the new owners of the local bottlenecks—the Regional Companies—from engaging in the competitive long distance, manufacturing, and information services markets (so as to make it impossible for them to duplicate the Bell practices, now that *they* controlled the bottlenecks).³²⁷

These simple yet drastic measures have already begun to bear fruit for the benefit of competition and of the users of the telephone. Contrary to much popular belief, the overall trend with respect to telephone rates is down,³²⁸ and the cost of telephone instruments is down dramatically.³²⁹ More importantly, competition has

³²⁷ See Part II-A, *supra*.

³²⁸ Long distance rates have declined in the last three years by roughly thirty percent. Local rates are not affected by the decree because, for technological reasons, they have had to remain in the monopolistic control of the Regional Companies which, as noted at pp. 581-82, *supra* were able initially to raise these rates. However, as a consequence of greater public and regulatory awareness and resistance, local rates rose only slightly during the current year, while long distance rates continued their substantial decline. Indeed, state regulatory commissions turned local rate increase requests in the first half of 1987 into rate reductions totalling \$92.6 million. *CommunicationsWeek*, August 24, 1987, at 30.

³²⁹ When the Bell System monopoly had full control, it refused to sell its telephones to consumers, or to permit anyone else to sell them, preferring to charge rentals in the neighborhood of \$5-7 per month or more, for a total in, say thirty years, of over \$2,000. Today, telephone instruments can be purchased in retail stores everywhere for \$25-30 and up. Even if new instruments were purchased

brought about innovations in telephone features on a scale and variety unknown before divestiture.³³⁰ While complaints about that divestiture and the ensuing inconveniences have by no means ceased, an understanding is beginning to emerge that these temporary dislocations are a necessary price for what the newly competitive marketplace can achieve.

It is the attempted destruction of that careful design that the motions now before the Court are all about. Almost before the ink was dry on the decree, the Regional Companies began to seek the removal of its restrictions. These efforts have had some success, in that they have tended to cause the public to forget that these companies, when still part of the Bell System, participated widely in anticompetitive activities, and that, were they to be

from time to time, the total cost would still be far below the unending rental fees.

³³⁰ There are now on the market at reasonable prices such by now commonplace features as residential telephones that are able to memorize dozens or hundreds of different phone numbers; telephones that repeat the last number called until it is no longer busy; cellular phones for business and emergency use; cordless phones; instruments that can be instructed by voice (*e.g.*, in an automobile) to call a certain individual, office, or number; and many others.

Parallel with the development of equipment that provides greater accessibility to the telephone user, devices are being produced and marketed that, in a sense, operate in the opposite direction: some of them display the caller's number before the receiver has been lifted; others provide a distinctive ring when a call is received from a number previously designated as worthy of priority consideration; still others automatically block calls from persons with whom the phone's owner does not wish to speak. For the first time since the invention of the telephone, these devices are returning control to the instrument's owner from every salesman, unwelcome relative, or even crackpot who may decide to call at any hour of the day or night.

It is surely not a coincidence that these features, and many more, have become available since the Bell monopoly was ended by divestiture and competition began to reign in the telecommunications marketplace.

freed of the restrictions, they could be expected to resume anticompetitive practices in short order, to the detriment of both competitors and consumers. Regional Company claims of wishing only to participate with others in long distance and other restricted businesses on a level playing field obscure the fact that there is no level playing field when one of the participants holds an unassailable franchise on the goal lines that no one else may touch without permission.

By direction of the decree itself, the restrictions placed on the Regional Companies may be removed only if these companies demonstrate that "there is no substantial possibility that they could use their monopoly powers to impede competition in the markets they seek to enter." The decree rests on the premise that the incentive and the ability to act anticompetitively existed in 1984 when that decree was entered, and the question before the Court therefore is only whether events in the three years since then have changed that situation.³³¹ Essentially three types of changes are claimed to have occurred.

First, it is argued that the local monopoly bottlenecks have been either wiped out or substantially eroded. However, by the finding of the Department of Justice's own expert, these bottlenecks are still so pervasive that only one in one million telephone users is able to bypass them to communicate with his ultimate customers on his own; the remaining 999,999 users remain strictly dependent for local connections upon the Regional Company monopolies.³³² Second, it is said that there are now seven Regional Companies instead of one nationwide Bell System. While that is certainly true, it is not a new development; it was foreseen and even mandated by the very decree that requires a *future* change in circumstances before the line of business restrictions may be removed. Moreover, in terms of monopoly power, the combined

³³¹ See part II, *supra*.

³³² See pp. 539-40, *supra*.

Regional Companies more or less equal the Bell System.³³³ Third, suggestions have been made that, unlike at the time of the entry of the decree, federal regulation can now prevent anticompetitive abuses. But FCC regulation, far from being more stringent than before, is today actually less so, for reasons of reductions in staff and changes in regulatory philosophy, among others. And although new and possibly stricter regulations have been discussed, they have not thus far been adopted; they are not even in final form; and they will not become effective, if at all, until next year or the year after that. Their ultimate impact on anticompetitive activities is therefore entirely speculative.³³⁴

The Court has accordingly concluded—it could not but conclude—that no significant changes have occurred with respect to the core restrictions—long distance, manufacturing, and the sale of information services—that would justify a radical change in the decree.

When the law and the facts are thus examined dispassionately, it becomes readily apparent that there is less to the Regional Company contentions than meets the eye. Indeed, had it not been for the drumbeat of a wide-ranging public relations campaign, no one would have seriously entertained the proposition that a solution arrived at after a thirty-year struggle, that had caused a major and wrenching change in the structure of the industry and the habits of most American telephone users, should be jettisoned in substantial part after a mere three years, particularly when the changes that have occurred in the interim in the power of those who control the local switches are insignificant.

If the interexchange and manufacturing motions were granted, the telecommunications industry would be back where it was when these struggles began. The Regional Companies would have the same incentives as well as the

³³³ See pp. 547-48, 555-56, *supra*.

³³⁴ Part VI, *supra*.

same means for discrimination, manipulation, and cross-subsidization that the Bell System possessed before the break-up.

Once before, in 1956, an antitrust suit against the Bell System was aborted precipitously by a Department of Justice decision,³³⁵ and that step laid the groundwork for many years of turmoil and travail in the industry, the courts, the regulatory commissions, and the Congress. That history must not be repeated. This Court cannot and will not lend its authority to so self-defeating an enterprise. It is therefore denying all the requests for the removal of the core restrictions of the decree.

B. *Transmission of Information and Catch-All Restriction*

At the same time, the Court is ordering the removal of two other restrictions where this will yield significant benefits without serious risk of harm to competition.

First. The wide-ranging yet diffuse "catch-all" restriction on the entry of the Regional Companies into all non-telecommunications markets is being repealed outright. Experience has shown that no substantial purpose is being served by requiring the Regional Companies to petition the Court whenever they wish to enter a business having no direct relationship to telecommunications, and where the risk of anticompetitive activity is relatively small. Indeed, the Court has to date granted over 160 "waivers" of this restriction and refused none. Although some danger of improper cross-subsidization remains, the benefits from a removal of this restriction outweigh that danger in this circumstance. Elimination of the restriction will also have the beneficial effect of permitting the Regional Companies hereafter to make decisions with respect to substantial segments of their business without day-to-day involvement or supervision by the Court.³³⁶

³³⁵ See pp. 529-30, 535-36, *supra*.

³³⁶ Part IX, *supra*.

Second. One of the core restrictions of the decree prohibits the Regional Companies from providing information services. The Court is retaining that restriction insofar as it involves the generation of information content, for the same reason that it is retaining the other core restrictions. If the Regional Companies had the authority to sell information in competition with other providers of these services, their control of the networks essential to the distribution of that information would give them the same ability to discriminate against competitors as they have with regard to interexchange services and the manufacture of telecommunications equipment.³³⁷

That does not mean, however, that the public must be deprived of the revolutionary changes that are possible if information, instead of being transmitted only by current methods,³³⁸ can also be made available to vast numbers of consumers instantaneously by means of the telephone network. Other nations—France in particular, but also Japan and Great Britain—have experimented with such an innovative use of the telephone system, with some considerable success. The French Teletel system—which may for present purposes serve as a rough guide in this regard—has some three million subscribers and is used to supply to these subscribers immediate access to about 4,000 independent services supplying specific information upon request in such fields as banking and brokerage, shopping (availability and price), travel (schedules and reservations), tickets to entertainment and sporting events, employment availability, language instruction, governmental notices, schedule of meetings of associations, reprints of newspaper and magazine articles, and others.

The Court has concluded that the apparently competing interests—prevention of monopolization of information services versus broad availability of such services to the

³³⁷ Part V, *supra*.

³³⁸ *E.g.*, by contacting a public library, through the mails, or by advance subscription to one of the existing information services.

public—can be reconciled by severing for decree purposes the generation of information content (which will remain prohibited to the Regional Companies) from the transmission of information services (which the Regional Companies will be allowed to provide).³³⁹

The Court will accordingly lift so much of the information services restriction as prevents the Regional Companies from constructing and operating a sophisticated network infrastructure³⁴⁰ that will make possible the transmission, on a massive scale, of information services originated by others, directly to the ultimate consumers.³⁴¹ No one can know with certainty whether this revolutionary means of transmitting useful, readily-available information will find acceptable in this country to the same extent as it has elsewhere. But the Court believes that it should do what it legitimately can to foster the availability of such a service.

The decisions made herein continue to advance the objectives of the decree as the Court understood them when it approved the decree in 1982, and in its rulings since then: (1) the establishment in the telecommunications industry of conditions of fair competition, freed from of the heavy hand of monopoly; (2) the protection of the goals of universal service and of reasonable rates for those who could not otherwise afford telephone service; and (3) the encouragement of innovation, to the end that the full benefits of a sophisticated telecommunications industry be made available to all segments of the American public in this Information Age.

³³⁹ See Part VII, *supra*.

³⁴⁰ Part VIII, *supra*.

³⁴¹ In order to receive this information in usable form, these consumers will not require, as now, a complex PBX to unscramble and receive it, or even a full-fledged computer terminal; they will only need to have what is called a "dumb terminal"—a relatively inexpensive instrument that could be sold by the Regional Companies and by more conventional retailers.

APPENDIX E

MODIFICATION OF FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such complaint denying the substantive allegations thereof; the parties, by their attorneys, having severally consented to a Final Judgment which was entered by the Court on January 24, 1956, and the parties having subsequently agreed that modification of such Final Judgment is required by the technological, economic and regulatory changes which have occurred since the entry of such Final Judgment;

Upon joint motion of the parties and after hearing by the Court, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Final Judgment entered on January 24, 1956, is hereby vacated in its entirety and replaced by the following items and provisions:

I

AT & T Reorganization

A. Not later than six months after the effective date of this Modification of Final Judgment, defendant AT & T shall submit to the Department of Justice for its approval, and thereafter implement, a plan of reorganization. Such plan shall provide for the completion, within 18 months after the effective date of this Modification of Final Judgment, of the following steps:

1. The transfer from AT & T and its affiliates to the BOCs, or to a new entity subsequently to be separated from AT & T and to be owned by the BOCs, of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT & T, exchange telecommunications and exchange access functions, including the procurement for, and engi-

neering, marketing and management of, those functions, and sufficient to enable the BOCs to meet the equal exchange access requirements of Appendix B;

2. The separation within the BOCs of all facilities, personnel and books of account between those relating to the exchange telecommunications or exchange access functions and those relating to other functions (including the provision of interexchange switching and transmission and the provision of customer premises equipment to the public); provided that there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions;

3. The termination of the License Contracts between AT & T and the BOCs and other subsidiaries and the Standard Supply Contract between Western Electric and the BOCs and other subsidiaries; and

4. The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT & T by means of a spin-off of stock of the separated BOCs to the shareholders of AT & T, or by other disposition; provided that nothing in this Modification of Final Judgment shall require or prohibit the consolidation of the ownership of the BOCs into any particular number of entities.

B. Notwithstanding separation of ownership, the BOCs may support and share the costs of a centralized organization for the provision of engineering, administrative and other services which can most efficiently be provided on a centralized basis. The BOCs shall provide, through a centralized organization, a single point of contact for coordination of BOCs to meet the requirements of national security and emergency preparedness.

C. Until September 1, 1987, AT & T, Western Electric, and the Bell Telephone Laboratories, shall, upon order of any BOC, provide on a priority basis all research, development, manufacturing, and other support services to enable the BOCs to fulfill the requirements of this Modification of Final Judgment. AT & T and its affiliates shall take no action that interferes with the BOCs' requirements of nondiscrimination established by section II.

D. After the reorganization specified in paragraph I (A) (4), AT & T shall not acquire the stock or assets of any BOC.

II

BOC Requirements

A. Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT & T and its affiliates.

B. No BOC shall discriminate between AT & T and its affiliates and their products and services and other persons and their products and services in the:

1. procurement of products and services;
2. establishment and dissemination of technical information and procurement and interconnection standards;
3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and
4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

C. Within six months after the reorganization specified in paragraph I(A) (4), each BOC shall submit to the Department of Justice procedures for ensuring compliance with the requirements of paragraph B.

D. After completion of the reorganization specified in section I, no BOC shall, directly or through any affiliated enterprise:

1. provide interexchange telecommunications services or information services;
2. manufacture or provide telecommunications products or customer premises equipment (except for provisions of customer premises equipment for emergency services; or
3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.

III

Applicability and Effect

The provisions of this Modification of Final Judgment, applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with each defendant and BOC who receive actual notice of this Modification of Final Judgment by personal service or otherwise. Each defendant and each person bound by the prior sentence shall cooperate in ensuring that the provisions of this Modification of Final Judgment are carried out. Neither this Modification of Final Judgment nor any of its terms or provisions shall constitute any evidence against, an admission by, or an estoppel against any party or BOC. The effective date of this Modification of Final Judgment shall be the date upon which it is entered.

IV

Definitions

For the purposes of this Modification of Final Judgment:

A. "Affiliate" means any organization or entity, including defendant Western Electric Company, Incorporated, and Bell Telephone Laboratories, Incorporated, that is under direct or indirect common ownership with or control by AT & T or is owned or controlled by another affiliate. For the purposes of this paragraph, the terms "ownership" and "owned" mean a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity. "Subsidiary" means any organization or entity in which AT & T has stock ownership, whether or not controlled by AT & T.

B. "AT & T" shall mean defendant American Telephone Company and its affiliates.

C. "Bell Operating Companies" and "BOCs" mean the corporations listed in Appendix A attached to this Modification of Final Judgment and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership.

D. "Carrier" means any person deemed a carrier under the Communications Act of 1934 or amendments thereto, or, with respect to intrastate telecommunications, under the laws of any State.

E. "Customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, but does not include equipment used to multiplex, maintain, or terminate access lines.

F. "Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access serv-

ices include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities and the provision of information necessary to bill customers. Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area, and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC. Such connections, at the option of the interexchange carrier, shall deliver traffic with signal quality and characteristics equal to that provided similar traffic of AT & T, including equal probability of blocking, based on reasonable traffic estimates supplied by each interexchange carrier. Exchange services for exchange access shall not include the performance by any BOC of interexchange traffic routing for an interexchange carrier. In the reorganization specified in section I, trunks used to transmit AT & T's traffic between end offices and class 4 switches shall be exchange access facilities to be owned by the BOCs.

G. "Exchange area," or "exchange" means a geographic area established by a BOC in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;

2. every point served by a BOC within a State shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States) shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), unless the Court shall otherwise allow; and

4. except with approval of the Court, no exchange area located in one State shall include any point located within another State.

H. "Information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

I. "Information access" means the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signaling, answer supervision, automatic calling number identification, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.

J. "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

K. "Interexchange telecommunications" means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area.

L. "Technical information" means intellectual property of all types, including, without limitation, patents, copyrights, and trade secrets, relating to planning documents, designs, specifications, standards, and practices and procedures, including employee training.

N. "Telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services.

O. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

P. "Telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

Q. "Transmission facilities" means equipment (including without limitation wire, cable, microwave, satellite, and fibreoptics) that transmit information by electromagnetic means or which directly support such transmission, but does not include customer premises equipment.

V

Compliance Provisions

The defendants, each BOC, and affiliated entities are ordered and directed to advise their officers and other

management personnel with significant responsibility for matters addressed in this Modification of Final Judgment of their obligations hereunder. Each BOC shall undertake the following with respect to each such officer or management employee:

1. The distribution to them of a written directive setting forth their employer's policy regarding compliance with the Sherman Act and with this Modification of Final Judgment, with such directive to include:

- (a) an admonition that non-compliance with such policy and this Modification of Final Judgment will result in appropriate disciplinary action determined by their employer and which may include dismissal; and

- (b) advice that the BOCs' legal advisors are available at all times to confer with such persons regarding any compliance questions or problems;

2. The imposition of a requirement that each of them sign and submit to their employer a certificate in substantially the following form:

The undersigned hereby (1) acknowledges receipt of a copy of the 1982 *United States v. Western Electric* Modification of Final Judgment and a written directive setting forth Company policy regarding compliance with the anti-trust laws and with such Modification of Final Judgment, (2) represents that the undersigned has read such Modification of Final Judgment and directive and understands those provisions for which the undersigned has responsibility, (3) acknowledges that the undersigned has been advised and understands that non-compliance with such policy and Modification of Final Judgment will result in appropriate disciplinary measures determined by the Company and which

may include dismissal, and (4) acknowledges that the undersigned has been advised and understands that non-compliance with the Modification of Final Judgment may also result in conviction for contempt of court and imprisonment and/or fine.

VI

Visitorial Provisions

A. For the purpose of determining or securing compliance with this Modification of Final Judgment, and subject to any legally recognized privilege, from time to time:

1. Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant or after the reorganization specified in section I, a BOC, made to its principal office, duly authorized representatives of the Department of Justice shall be permitted access during office hours of such defendants or BOCs to depose or interview officers, employees, or agents, and inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, BOC, or subsidiary companies, who may have counsel present, relating to any matters contained in this Modification of Final Judgment; and

2. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office or, after the reorganization specified in section I, a BOC, such defendant, or BOC, shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Modification of Final Judgment as may be requested.

B. No information or documents obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States or the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by a defendant to plaintiff, such defendant or BOC represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant or BOC marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days' notice shall be given by plaintiff to such defendant or BOC prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant or BOC is not a party.

VII

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

VIII

Modifications

A. Notwithstanding the provisions of section II(D) (2), the separated BOCs shall be permitted to provide, but not manufacture, customer premises equipment.

B. Notwithstanding the provisions of section II(D) (3), the separated BOCs shall be permitted to produce, publish, and distribute printed directories which contain advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses.

Notwithstanding the provisions of section I(A) (1), I(A) (2), I(A) (4), all facilities, personnel, systems, and rights to technical information owned by AT & T, its affiliates, or the BOCs which are necessary for the production, publication, and distribution of printed advertising directories shall be transferred to the separated BOCs.

C. The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

D. AT & T shall not engage in electronic publishing over its own transmission facilities. "Electronic publishing" means the provision of any information which AT & T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.

Nothing in this provision precludes AT & T from offering electronic directory services that list general prod-

uct and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses; or from providing the time, weather, and such other audio services as are being offered as of the date of the entry of the decree to the geographic areas of the country receiving those services as of that date.

Upon application of AT & T, this restriction shall be removed after seven years from the date of entry of the decree, unless the Court finds that competitive conditions clearly require its extension.

E. If a separated BOC provides billing services to AT & T pursuant to Appendix B(C) (2), it shall include upon the portion of the bill devoted to interexchange services the following legend:

This portion of your bill is provided as a service to AT & T. There is no connection between this company and AT & T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

F. Notwithstanding the provisions of Appendix B(C) (3), whenever, as permitted by the decree, a separated BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT & T, the tariffs filed for such less-than-equal access shall reflect the lesser cost, if any, of such access as compared to the exchange access provided AT & T.

G. Facilities and other assets which serve both AT & T and one or more BOCs shall be transferred to the separated BOCs if the use made by such BOC or BOCs predominates over that of AT & T. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

H. At the time of the transfer of ownership provided for in section I(A)(4), the separated BOCs shall have debt ratios of approximately forty-five percent (except for Pacific Telephone and Telegraph Company which shall have a debt ratio of approximately fifty percent), and the quality of the debt shall be representative of the average terms and conditions of the consolidated debt held by AT & T, its affiliates and the BOCs at that time. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

I. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

J. Notwithstanding the provisions of section I(A), the plan of reorganization shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC.,
and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

AMERITECH'S MOTION FOR REMOVAL OF
CERTAIN OF THE DECREE'S LINE-OF-BUSINESS
RESTRICTIONS

[Filed Apr. 24, 1987]

Ameritech hereby moves the Court for removal of the following line-of-business restrictions on Ameritech contained in § II(D) of the decree, on the grounds that the Report and Recommendations of the United States Concerning the Line of Business Restrictions, the Huber Report, and the initial, response and reply comments thereon, establish that, under § VIII(C), there is no substantial possibility that Ameritech "could use its monopoly power to impede competition in the markets[s]" addressed by those restrictions:

1. the provision of information services,
2. the manufacturers or provision of telecommunications products,

3. the manufacture of customer premises equipment,
4. the provision of the following interexchange telecommunications services:
 - a. mobile telecommunications services;
 - b. designing, engineering, integrating and providing private networks for voice and data;
 - c. reselling services or acting as agent for private network end users in ordering services;
 - d. providing services outside the Ameritech region;
 - e. terminating traffic inside the Ameritech region that has originated outside the Ameritech region;
 - f. providing services inside the Ameritech region upon satisfaction of appropriately defined conditions; and
 - g. providing packet switched data telecommunications.
5. the provision of nontelecommunications products and services.

Respectfully submitted,

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290a

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DATED: April 24, 1987

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC.,
and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

MOTION OF BELL ATLANTIC TO REMOVE
PORTIONS OF THE LINE OF BUSINESS
RESTRICTIONS CONTAINED IN THE AT&T
CONSENT DECREE

Bell Atlantic moves this Court, pursuant to section VIII(C) of the Modification of Final Judgment, for an order removing certain of the line of business restrictions contained in section II(D) of that Decree. There is no substantial possibility that Bell Atlantic could impede competition in the markets it seeks to enter.

Bell Atlantic seeks the removal of the information services restriction contained in section II(D)(1) of the Decree and the removal of the restrictions contained in sections II(D)(2) and (3) prohibiting Bell Atlantic from manufacturing telecommunications products and customer premises equipment and from engaging in nontelecommunications businesses.

If the Court grants Bell Atlantic's motion to remove the restrictions on nontelecommunications businesses, then Bell Atlantic further requests that the Court vacate Bell Atlantic's existing waivers relating to such businesses.

Bell Atlantic requests relief from section II(D)(1) to the limited extent necessary to authorize it to provide interexchange cellular and other mobile radio services; interexchange services that both originate and terminate outside its regional service area; interexchange 800, WATS, packet switched and private network services (except to the extent that any such service originates or terminates in any portion of a LATA within Bell Atlantic's regional service area in which intraexchange competition for such service is prohibited); and improved vendor coordination service to customers who need private network services, such vendor coordination service to include the ability to recommend and provide consulting services on all aspects of interexchange services.

Finally, Bell Atlantic requests such further relief from the Decree's restrictions as shall be presently granted to any other BOC or regional company subject to the Decree.

Respectfully submitted,

/s/ Robert A. Levetown
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Of Counsel

JOHN M. KELLEHER
 JOSEPH E. MURPHY

Dated: April 27, 1987

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
v. *Plaintiff,*

WESTERN ELECTRIC COMPANY, INC.
and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

BELLSOUTH CORPORATION'S
MOTION FOR RELIEF UNDER SECTION II (D)
OF THE MODIFICATION OF FINAL JUDGMENT

BellSouth Corporation, by its attorneys, hereby moves, pursuant to Section VIII(C) of the Modification of Final Judgment ("MFJ"), that the Court

(1) remove the interexchange telecommunication services restriction contained in Section II(D)(1) of the MFJ with respect to:

(a) mobile telecommunications services, including cellular, conventional mobile radio, paging, marine mobile, air-to-ground, and similar specialized telecommunications services;

(b) all interexchange telecommunications originating outside the area served by the BellSouth operating telephone companies;

(c) all interexchange services for interexchange telecommunications of data;

(d) all interexchange services for telecommunications originating within any private telecommunications network;

(e) all other interexchange services provided through one or more entities that are separate from the BellSouth operating telephone companies, if such entities obtain

their own debt financing on their own credit such that no entity affiliated with BellSouth will guarantee the debt in a manner that would permit a creditor, on default, to have recourse to the stock or assets of any BellSouth operating telephone company.

(2) remove the information services restriction contained in Section II(D) (1) of the MFJ;

(3) remove Sections II(D) (2) and VIII(A) of the MFJ;

(4) remove Section II(D) (3) of the MFJ.

The ground for this Motion, as more fully set forth in the attached "BellSouth Corporation Response to Comments on the Justice Department Recommendations and Memorandum in Support of Motion for Relief from Section II(D) of the Modification of Final Judgment", is that the relief from Section II(D) requested in this Motion is warranted under the standard set forth in Section VIII(C) of the MFJ. An appropriate order is attached.

Respectfully submitted,

BELLSOUTH CORPORATION

By /s/ Norman C. Frost
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By /s/ Abbott B. Lipsky, Jr.
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April 27, 1987

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, *et al.,*
Defendants.

MOTION OF NYNEX CORPORATION
TO REMOVE RESTRICTIONS IMPOSED BY
SECTION II (D) OF THE MODIFICATION OF
FINAL JUDGMENT

NYNEX Corporation, by its attorneys, pursuant to Section VIII(C) of the Modification of Final Judgment ("MFJ"), hereby moves the Court for an order removing restrictions imposed by Section II(D) of the MFJ. Specifically, relying on the Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment, filed February 2, 1987, with the Court, on comments filed March 13, 1987 and responses to comments filed April 27, 1987 with the Court in connection with the said Report, NYNEX Corporation requests that the Court (i) remove without conditions the restrictions imposed by virtue of Section II (D) of the MFJ, (ii) vacate as moot prior orders of the Court granting with conditions specific waivers of the said restrictions, (iii) vacate as moot Section VIII(A),

the first paragraph of Section VIII(B), and Section VIII(C) of the MFJ, and (iv) grant such other and further relief as the Court deems just in the circumstances.

Respectfully submitted,

NYNEX CORPORATION

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Dated: April 27, 1987

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,
v.

WESTERN ELECTRIC COMPANY, INC.,
and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

MOTION OF PACIFIC TELESIS GROUP FOR
WAIVER OF THE LINE OF BUSINESS
RESTRICTIONS

Pacific Telesis Group, Pacific Bell and Nevada Bell ("Pacific") hereby move for an order pursuant to section VIII(C) of the decree granting a waiver of the line-of-business restrictions of Section II(D) of the decree. We assume the Court may apply the conditions of its July 26, 1984 decision (592 F. Supp. 846) and move that the separate subsidiary requirements of those conditions not apply to intrastate telecommunications service or information services.

In support of this motion Pacific incorporates herein by reference (1) the Report and Recommendations of the Department of Justice, (2) the underlying report of Dr. Huber filed on February 2, 1987, (3) the comments filed by Pacific on March 13, 1987, and (4) the Further

Comments of Pacific filed concurrently herewith and the declaration of Professor Hausman attached thereto.

Respectfully submitted,

/s/ Stanley J. Moore
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Dated: April 27, 1987

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,
v.

WESTERN ELECTRIC COMPANY, INC.,
and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

MOTION OF SOUTHWESTERN BELL
CORPORATION FOR REMOVAL OF CERTAIN OF
THE RESTRICTIONS OF SECTION II(D) OF
THE MODIFICATION OF FINAL JUDGMENT

1. Southwestern Bell Corporation ("SBC") hereby moves the Court, pursuant to Section VIII(C) of the Modification of Final Judgment ("MFJ" or "Decree"), to remove the restrictions of Section II(D) of the Decree, as set forth below. This motion is supported by the March 13, 1987 Comments of Southwestern Bell Corporation on the Report and Recommendations of the United States Concerning Line of Business Restrictions (the "Report"), by the Report itself and its underlying factual support, by the Response of Southwestern Bell Corporation to Comments Concerning the Report and Recommendations of the United States Regarding Line of Business Restrictions filed with this Motion, and by the affidavits and other evidentiary matter submitted in support of collateral motions filed by the other six Regional Holding Companies, excepting only such supporting materials as de-

scribe the unique operations of another Regional Holding Company or its affiliate.

2. SBC seeks removal of the restrictions imposed on it by Section II (D) of the Decree to the extent necessary to enable SBC to engage in the following business activities: (A) to provide private network interexchange telecommunications services; (B) to provide interexchange cellular service, conventional mobile service, paging, and other interexchange mobile radio services; (C) to provide other interexchange telecommunications services through an entity which is structurally separate from SBC's operating telephone subsidiary; (D) to provide information services; (E) to manufacture customer premises equipment ("CPE"); (F) to manufacture and to provide telecommunications equipment; and (G) to provide nontelecommunications products and/or services.

A. SBC seeks removal of the restriction prohibiting it from providing interexchange private telecommunications networks on a facility or resale basis in any geographic area. SBC believes that the operating telephone companies now subject to the Decree should not be restricted in the provision of interexchange services, whether within or outside their respective regions. This paragraph, however, seeks the authority to provide interexchange services only to customers who elect to satisfy their telecommunications requirements through private networks. These customers invariably are sophisticated in their selection and use of telecommunications facilities and services and are capable of determining and obtaining their telecommunications requirements independently of the public switched network. As SBC demonstrated in its March 13, 1987 Comments,¹ SBC could not manipulate its ownership of access facilities to the detriment of SBC's competitors or potential customers for this type of service. Thus, while SBC continues to believe that the

¹ pp. 28-30.

criteria suggested by the Department for relaxation of the ban on intraregional interexchange services are inappropriate, such criteria are clearly unnecessary to protect the limited customer market which SBC seeks here to serve.

B. SBC seeks removal of the restriction prohibiting it from providing interexchange services in conjunction with cellular service, conventional mobile service, paging, and other mobile radio services as recommended by the Department. SBC submits that the Section VIII(C) standard has been satisfied for interexchange mobile radio services: with federal and state regulatory safeguards, there is no substantial possibility that SBC could use Southwestern Bell Telephone Company's (SWBT) ownership of local exchange facilities to impede competition in the interexchange mobile radio telecommunications services market.

C. SBC seeks removal of the restriction prohibiting it from providing any other interexchange service, within or outside its region, subject, however, to its provision of such services through a subsidiary that is structurally separate from SBC's operating telephone subsidiary. Such structural separation would prevent SBC's ownership of any monopoly facilities from impeding competition in the interexchange market.

D. SBC seeks removal of the restriction prohibiting it from providing information services. SBC's provision of such services would continue to be governed by applicable rules and regulations of the Federal Communications Commission ("FCC").² There is no substantial possibility that SBC could abuse monopoly power to harm competition in information service markets because, absent future authorization by the FCC, SBC must provide information services through a subsidiary separate from

² The FCC's Rules address "enhanced services." The definitions of enhanced services and information services, while not literally identical, largely embrace the same activities.

SBC's operating telephone company. Such structural separation will eliminate any significant risk of discrimination or undetected cross-subsidization. Future authority to provide information services on a non-separated basis will be granted only after the FCC has determined that there are adequate nonstructural safeguards to prevent harm to competition.

Unless the information service restriction is lifted, SBC and the other BOCs will face unnecessary, and possibly inconsistent, duplicative regulation. Because the FCC has the expertise and the demonstrated interest in careful control of BOC entry into information service markets, there is no need for continued restriction of entry by this court.

E. SBC seeks removal of the restrictions prohibiting it from manufacturing Customer Premises Equipment ("CPE"). SBC is currently prohibited from that business activity by Section II(D)(2) of the Decree, as modified by Section VIII(A), which provides that the BOCs may provide, but not manufacture, CPE. As set forth in the supporting documents mentioned above, SBC would have neither the opportunity nor the incentive to discriminate with respect to SWBT's network design in order to favor SBC-manufactured CPE. Furthermore, the FCC's required safeguards prevent SWBT from cross-subsidizing SBC's manufacturing activities.³ SBC thus submits that the Section VIII(C) standard has been satisfied: there is no substantial possibility that SBC could use SWBT's ownership of local exchange facilities to impede competition in the CPE manufacturing market.

F. SBC seeks removal of the restrictions prohibiting it from manufacturing and/or providing telecommunications equipment. SBC is currently prohibited from that business activity by Section II(D)(2) of the Decree. As

³ *In the Matter of Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities Report and Order*, CC Docket No. 86-111, FCC No. 86-564 (released February 6, 1987).

set forth in the supporting documents mentioned above, SBC could not discriminate in its design or deployment of network services since industry forums are responsible for the establishment of network standards and since SBC is bound by strict network disclosure requirements.⁴ Furthermore, the FCC's cost allocation rules prevent SBC from cross-subsidizing its equipment manufacturing activities with revenues from its regulated activities.⁵ SBC submits that the Section VIII(C) standard has been satisfied: there is no substantial possibility that SBC could use SWBT's ownership of local exchange facilities to impede competition in the telecommunications equipment manufacturing market.

G. SBC seeks removal of the restriction prohibiting it from providing nontelecommunications products and/or services. SBC is currently prohibited from such activities by Section II(D)(3) of the Decree. The vast majority of the waivers granted by this Court to BOCs during the three years since divestiture have permitted the BOCs to enter nontelecommunications lines of business. As set forth in the supporting documents mentioned above, these nontelecommunications businesses are not dependent on the provision of exchange telecommunications or exchange access services, so SWBT could not discriminate in favor of these businesses in the design or deployment of network services. Furthermore, the FCC's cost allocation rules prevent SBC from using revenues from regulated businesses to cross-subsidize these nontelecommunications lines of business.⁶ SBC submits that the Section VIII(C) standard has been satisfied: there

⁴ Several FCC rules and orders govern network disclosure requirements. See, *Report and Order*, Third Computer Inquiry, paragraph 252; 47 C.F.R. Sections 68.110 and 64.702. See also *Computer and Business Equipment Manufacturers Association; Petition for Declaratory Ruling Regarding Section 64.702(d)(2) of the Commission's Rules and the Policies of the Second Computer Inquiry*, 93 FCC 2d 1226 (1983).

⁵ *Report and Order*, CC Docket No. 86-111.

⁶ *Id.*

is no substantial possibility that SBC could use SWBT's ownership of local exchange facilities to impede competition in the various markets for nontelecommunications products and services.

3. SBC agrees that the monitoring and visitorial provisions of Section VI of the Decree shall apply to the activities in which SBC could participate pursuant to the approval of this Motion and to any entity or entities affiliated with SBC engaging in such activities. Likewise, the equal access provisions of the Decree would not be affected by a grant of the relief sought herein and would continue in effect in accordance with the Decree's provisions.

Southwestern Bell Corporation respectfully urges the Court to grant the relief requested herein and to vacate prior line-of-business waiver Orders entered by the Court as mooted by the relief sought herein.

Respectfully submitted,

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April 27, 1987

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, *et al.*,
Defendants.

MOTION OF U S WEST, INC. FOR RELIEF FROM
LINE OF BUSINESS RESTRICTIONS IMPOSED BY
SECTION II (D) OF THE MODIFICATION
OF FINAL JUDGMENT

[Filed Apr. 27, 1987]

U S WEST, Inc. hereby moves, pursuant to Section VIII(C) of the Modification of Final Judgment ("MFJ"), for relief from the line of business restriction imposed upon itself and its affiliates by MFJ Section II(D) in the following respects:

(1) Removal of the prohibition of MFJ Section II(D) (1) concerning information services in its entirety or, failing that, subject to conditions providing (a) that information content created by a U S WEST Operating Company is of a kind not currently permitted to be provided under the MFJ may be provided only through a separate subsidiary of U S WEST and (b) that equal exchange access shall be provided to all information services providers without discrimination in the terms and conditions of such access.

(2) Removal of the prohibition of MFJ Section II(D) (2) concerning manufacture or provision of telecommunications products and customer premises equipment in its entirety.

(3) Removal of the prohibition of MFJ Section II(D) (1) concerning interexchange telecommunications services insofar as it prohibits (a) interexchange services provided by a separate subsidiary of U S WEST, subject to any necessary and appropriate conditions, and (b) mobile interexchange services as well as ancillary information services for mobile customers.

(4) Removal of the prohibition of MFJ Section II(D) (3) concerning nontelecommunications products and services in its entirety.

(5) Vacation of previous Orders waiving line of business restrictions which contain conditions limiting U S WEST's provision of mobile services or conduct of non-telecommunications businesses.

This motion is based upon the following factual materials:

- (1) The 1987 Report on Competition in the Telephone Industry ("The Geodesic Network") prepared by Peter W. Huber and submitted by the Department of Justice in support of its February 2, 1987 Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment, except insofar as its findings are inconsistent with facts submitted or cited in support of this motion.
- (2) The affidavits and other factual materials set forth in the two-volume U S WEST Appendix in Support of Motion for Relief from Line of Business Restrictions Imposed by § II(D) of the Modification of Final Judgment submitted herewith.

- (3) The Comments of certain intervenors submitted in response to the Report and Recommendations of the United States and additional materials of record or subject to judicial notice, insofar as they are cited in support of this motion.

The reasons for granting this motion are stated in the accompanying Memorandum for U S WEST, Inc. Presenting Points And Authorities In Support Of Its Motion For Relief From Line Of Business Restrictions Imposed By Section II(D) Of The Modification Of Final Judgment And Responding To Comments, as well as in the Comments of U S WEST, Inc. filed on March 13, 1987. A proposed Order is submitted herewith.

Respectfully submitted,

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April 27, 1987

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

MOTION OF THE UNITED STATES FOR
PARTIAL REMOVAL OF THE LINE-OF-BUSINESS
RESTRICTIONS IMPOSED ON THE
BELL OPERATING COMPANIES BY THE
MODIFICATION OF FINAL JUDGMENT

The United States moves for an Order pursuant to section VIII(C) of the Modification of Final Judgment ("MFJ" or "decree") to remove the restrictions imposed on the Bell Operating Companies ("BOCs") by section II(D) of the decree, except the prohibition on interexchange telecommunications services, and to modify the interexchange prohibition to permit the BOCs to provide interexchange cellular radio, paging, and other mobile services.

The United States asks that the Court condition each BOC's right to provide the services originally prohibited by section II(D) on its filing with the Court a stipulation expressly accepting the conditions set forth in the proposed Order. The conditions that the BOCs must accept: (1) extend the equal access provisions of section II(A)

of the decree to expressly prohibit discrimination by a BOC in favor of its own services or those of any affiliated enterprise; (2) require that BOC interLATA cellular systems provide equal access; and (3) extend the nondiscrimination provisions of section II(B) of the decree—with the exception of those provisions dealing with procurement—to expressly prohibit discrimination by a BOC in favor of its own products or services or those of any affiliated enterprise.

The grounds for this Motion are set forth in the *Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment* (filed February 2, 1987), and the *Response of the United States to Comments on Its Report and Recommendations Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment* (filed April 27, 1987). Under current technological, competitive, and regulatory conditions, there is no substantial possibility that the BOCs could use their monopoly power to impede competition in markets other than landline interexchange telecommunications, and the decree restrictions on BOC participation in such markets themselves may impair competition and efficiency. The conditions that a BOC must accept in order to be allowed to provide services originally prohibited by section II(D) of the decree, combined with existing regulatory controls and the antitrust laws are adequate to prevent any significant anticompetitive conduct.

Because review under the decree of the BOC's procurement decisions is not necessary to protect competition, the United States also asks the Court to delete section II(B) (1) of the decree and the reference to "procurement" standards in section II(B) (2).

Finally, the United States requests that the Court establish a date three years from the date of entry of its

order on this Motion (rather than January 1990) as the date for the United States' second triennial report to the Court. In that report, the United States will assess whether the interexchange services prohibition should be maintained at that time.

Respectfully submitted,

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Dated: April 27, 1987



③
No. 90-9

Supreme Court, U.S.

FILED

SEP 7 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERATION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO, THE COMPUTER SOFTWARE AND SERVICES INDUSTRY ASSOCIATION, INC., INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC., TANDY CORPORATION, PHONE PROGRAMS, INC., OHIO CONSUMERS' COUNSEL, NATIONAL TELECOMMUNICATIONS NETWORK, MARYLAND PEOPLE'S COUNSEL, RADIOPHONE, INC., AD HOC TELECOMMUNICATIONS USERS COMMITTEE, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA, BELL ATLANTIC CORPORATION, AMERITECH, NYNEX CORPORATION, SOUTHWESTERN BELL CORPORATION, BELL SOUTH CORPORATION, PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF IN OPPOSITION OF RESPONDENT
REGIONAL BELL OPERATING COMPANIES**

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September 7, 1990

BATIMAN & SLADE, INC.

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BEST AVAILABLE COPY

RULE 29.1 STATEMENT

Respondent Regional Bell Operating Companies ("BOCs") are publicly held corporations principally in the business of providing communications services and products to the general public. They have no parent companies. Their nonwholly owned subsidiaries are listed below.

Ameritech. Respondent American Information Technologies Corporation ("Ameritech") has no nonwholly owned subsidiaries.

Bell Atlantic. Respondent Bell Atlantic Corporation has two nonwholly owned subsidiaries: Bell Atlantic Directory Graphics, Inc., and Bell Atlantic Systems Integration Corp.

BellSouth. Respondent BellSouth Corporation has no nonwholly owned subsidiaries.

NYNEX. Respondent NYNEX Corporation has no nonwholly owned subsidiaries.

Pacific Telesis. Respondent Pacific Telesis Group has no nonwholly owned subsidiaries.

Southwestern Bell. Respondent Southwestern Bell Corporation has one nonwholly owned subsidiary: Aurec Cable TV (1988) Ltd.

U S West. Respondent U S West, Inc., has one nonwholly owned subsidiary: U S West NewVector Group, Inc.

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No. 90-9
IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERATION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO, THE COMPUTER SOFTWARE AND SERVICES INDUSTRY ASSOCIATION, INC., INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC., TANDY CORPORATION, PHONE PROGRAMS, INC., OHIO CONSUMERS' COUNSEL, NATIONAL TELECOMMUNICATIONS NETWORK, MARYLAND PEOPLE'S COUNSEL, RADIOFONE, INC., AD HOC TELECOMMUNICATIONS USERS COMMITTEE, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA, BELL ATLANTIC CORPORATION, AMERITECH, NYNEX CORPORATION, SOUTHWESTERN BELL CORPORATION, BELL SOUTH CORPORATION, PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF IN OPPOSITION OF RESPONDENT
REGIONAL BELL OPERATING COMPANIES**

STATEMENT OF THE CASE

This case concerns a narrow dispute over the standards for removing the information services restriction in the consent decree that ended the *AT&T* antitrust litigation.

That restriction rested solely on the parties' election to include it. As the court of appeals observed, "[t]he Government's case in the AT&T antitrust litigation centered exclusively on AT&T's activities in the interexchange-service and equipment-manufacturing markets"; there were no allegations, or evidence presented, of anticompetitive activity in the information services market. 900 F.2d at 307; App. 52a. ("App." denotes Appendix to Petition.) The information services restriction was inserted into the decree by the parties purely "as a precautionary measure in light of uncertainty about how divestiture of AT&T would affect the development of this embryonic market." *Id.* "Under these circumstances," the court of appeals held, the information services restriction was not required to be in the decree in the first place — i.e., "it would not have been legal error for the district court to approve the decree had the parties *not* agreed on their own to include the restriction on information services." *Id.* (emphasis in original).

The parties also agreed, in May 1982, to specific standards governing motions to remove the various line-of-business restrictions from the decree. As to motions *uncontested* by the decree parties, the parties expressly indicated their acceptance of the traditional common law standard, which requires approval of a decree modification so long as it falls within the broad reaches of the public interest. *See* 900 F.2d at 306; App. 50a ("'[i]n the event that the parties agree to an amendment of the modification to remove [a line-of-business] restriction, the standard for such removal would be whether it is in the public interest'") (quoting brief of the United States; also citing AT&T brief to same effect).

As to *contested* motions to modify the decree, in their filings the parties indicated their willingness to accept a variant of the traditional common law rule of *United States v. Swift & Co.*, 286 U.S. 106, 118-19 (1932), under which relief would be granted "upon a finding 'that 'the rationale for [the restric-

tion] is outmoded by technical developments," "even if such developments were foreseeable. 900 F.2d at 306; App. 50a (quoting 552 F. Supp. at 195 (quoting government brief)). But in August 1982, in its review of the proposed decree, the district court rejected this *Swift* approach. It observed that this standard "incorporates the Department of Justice's view that the restrictions are justified by the mere existence of monopoly power," *United States v. AT&T*, 552 F. Supp. 131, 195 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), a view that the district court had earlier rejected as overly simplistic and potentially anti-competitive. *Id.* at 187. Explaining that use of this *Swift* standard could "limit competition by preventing the entry of a viable competitor," *id.* at 195 n.264, the district court "conditioned approval of the decree on adoption of section VIII(C)," its own proposed addition, "in order to alter the parties' stated intention" concerning contested motions. 900 F.2d at 306; App. 50a. Section VIII(C) requires that a restriction "shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."

Nowhere in its August 1982 opinion did the district court state that it was displacing the parties' explicit May 1982 agreement that the public interest standard would govern *uncontested* motions to modify the decree, where no party objected to the removal of a restriction. Since 1982, all of the parties to the decree — the government, AT&T, and the BOCs — have stated their understanding that Section VIII(C) is an additional standard for removal of the restrictions, one that supplements the common law standards agreed to by the parties from the beginning.¹

¹ For example, then-Asst. Attorney General Douglas H. Ginsburg stated in a letter to Rep. John D. Dingell, dated Oct. 2, 1986, at 39, that "the line of business restrictions could be removed pursuant *either* to a motion for a waiver under Section VIII(C) *or* to a request for modification in accordance with the

In line with this agreement, in the 1987 Triennial Review proceedings in the district court the "BOC petitions regarding information services," which were uncontested, rested on the public interest standard, whereas BOC petitions to remove the other restrictions, which were contested, rested on Section VIII(C). 900 F.2d at 294; App. 24a-25a.² In addition to the evidence presented by the BOCs, the Department of Justice introduced substantial evidence supporting its view that entry of the BOCs into the information services market would not pose anticompetitive dangers, and that the current ban deprives consumers of substantial benefits.³

standards for modifying antitrust decrees," Ct.App.J.A. 1004 (emphasis added). AT&T stated in its brief below that "Section VII of the Decree continues to permit modification of the Decree's provisions if the 'common law' standards of decree modification are satisfied." Brief of AT&T in the court of appeals, filed July 25, 1989, at 17 n.17. The BOCs, of course, argued the Section VII public interest standard both in the district court and in the court of appeals.

² Petitioners observe that in the BOCs' initial motions for removal of the information services restriction — filed when it was not yet clear whether information services relief would be contested — the BOCs invoked Section VIII(C). (Pet. 10 & n.17). Nothing in those filings prevented the BOCs from later invoking the public interest standard, as was done once it became clear that no party to the decree opposed relief. Ct.App.J.A. 2213-14 (BellSouth's Response to Comments). The district court in no way suggested that the public interest standard had somehow been waived; rather, it expressly ruled that the public interest standard was not available under the decree. The court of appeals held that the standard was properly invoked, and that the district court erred in failing to apply it.

³ As noted *supra* p. 2, the information services restriction, when agreed to in 1982, was not based on proof of BOC anticompetitive conduct or on any in-depth analysis of the information services market. After completing its first comprehensive analysis of the market in 1987, the Department urged lifting of the information services restriction, noting the large size of many competitors and the increasing globalization of the information services market, and concluding that there was no realistic prospect that the BOCs would obtain market power if allowed to enter that market. Report and Recommendations of the United States, filed Feb. 2, 1987 (Ct.App.J.A. 1006-1221), at 111-29. The Department also pointed out that various regulatory protections "should mitigate, even if they do not completely eliminate," the risks of anticompetitive behavior. *Id.* at 133.

The district court, in its 1987 ruling, rejected the BOCs' invocation of the public interest standard. The district judge explained that he was in an unusually "advantageous position" to resolve this issue, given his experience with the case and the fact that he "was the author of section VIII(C)," 673 F. Supp. at 533 n.24; App. 120a-121a n.24, and he ruled that Section VIII(C) is to govern all requests to lift restrictions, whether contested or uncontested.⁴ Nowhere did he refer to the parties' explicit May 1982 endorsement of the public interest test, or explain exactly how the decree or his August 1982 opinion could be read as having displaced that agreement with a rule that the Section VIII(C) test would govern *all* motions. Nonetheless, applying Section VIII(C), the district court denied information services relief on the basis that the BOCs had failed to carry their burden under that test.⁵

In representing consumer interests, the Department also explained that:

[W]hile it was assumed at the time the decree was entered that a general prohibition on BOC provision of information services would not deprive the public of access to various types of information services or significant efficiencies, this assumption has been disproved by subsequent developments.

* * *

Consumers have been deprived of some services already, and the potential that efficiency will be sacrificed or that services made possible by new technical developments will be unavailable to BOC customers is likely to be even greater in the future.

Id. at 153-54. The Department stressed that information services restrictions impose particularly heavy costs on "residential consumers generally, . . . the elderly and handicapped, [and] small and large entrepreneurs," Response of the United States, filed Apr. 27, 1987 (Ct. App. J.A. 2319-2341B), at 69-70.

The Department's August 1990 conclusions in the ongoing remand proceeding reaffirm these 1987 findings. See *infra* note 17.

⁴673 F. Supp. at 532-35 & nn.22, 24, 26, 34 & 35; App. 119a-125a & nn. 22, 24, 26, 34 & 35.

⁵673 F. Supp. at 562-67; App. 184a-195a. The district court did lift the information services restriction with respect to certain limited functions involving the transmission of information, and "gateway" services, but not the generation or manipulation of content. See 673 F. Supp. at 587-97; App. 238a-260a, and *United States v. Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988); App. 62a.

In the court of appeals, no party to the decree defended the district court's failure to apply the public interest standard. Various nonparties, however, which had been granted limited intervention status by the district court, argued that Section VIII(C) was the exclusive standard. The court of appeals, in a unanimous *per curiam* opinion (by Edwards, Mikva and Silberman, JJ.), rejected these arguments.

In resolving this dispute, the court of appeals relied on the conventional tools of language and context set down by this Court in cases like *United States v. Armour & Co.*, 402 U.S. 673 (1971), and *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975), for the interpretation of consent decrees. See 900 F.2d at 293; App. 22a-23a. It accepted as its starting point a proposition that petitioners nowhere question: "a less demanding standard of review applies to an uncontested motion to modify a consent decree than applies to a contested one," so that "unless the parties have expressly agreed otherwise . . . when all parties to a decree assent to a particular modification, the relevant inquiry for the court is whether the resulting array of rights and liabilities comports with the 'public interest.' " 900 F.2d at 305; App. 47a-48a (citations omitted).

The court's question, therefore, was whether the parties had "expressly agreed otherwise." Examining the text of what petitioners insist is the definitive term of the decree, Section VIII(C), the court was unable to find any intention to depart from the "public interest" standard that ordinarily applies to uncontested modifications. Section VIII(C) simply guarantees that line-of-business restrictions "shall be removed upon a showing by the petitioning BOC" of particular market facts; as the court below observed, "Section VIII(C) does not purport to be the *exclusive* standard for reviewing motions to modify restrictions," 900 F.2d at 306; App. 49a (emphasis in original). It concluded that, "[a]t best, section VIII(C) must be deemed to be silent on the question of what standard applies to uncontested motions," *id.*

Moreover, as the court of appeals observed, given the context in which Section VIII(C) was added to the decree, its reference to "petitioning BOC" appeared to contemplate BOC motions for removal where relief was *contested* by a party. Looking to "[t]he circumstances surrounding the formation of the decree," and citing the parties' May 1982 filings with the district court, the court concluded that these "leave little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII." 900 F.2d at 306; App. 50a. The court further observed that "[t]he addition of section VIII(C) cannot be viewed as altering this understanding." *Id.*

The intervenors who addressed this issue argued, quoting a sentence in the *text* of page 195 of the district court's August 1982 opinion, that "Section VIII(C) was designed, and incorporated into the decree, specifically to 'avoid any question about the appropriate test.'" Joint Brief of Electronic Publishing Participants, filed July 25, 1989, at 10 (quoting 552 F. Supp. at 195). The court of appeals responded by quoting *the footnote to this district court statement* that appears immediately after the words "appropriate test," indicating *which* test the district court wished to "avoid any question about." It observed: "The trial court expressly noted that the standard in section VIII(C) would supplant '[t]he test usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*'" 900 F.2d at 306; App. 50a (court of appeals' emphasis) (citation omitted) (quoting 552 F. Supp. at 195 n.266).⁶

⁶In response to the Electronic Publishing Participants' brief, the BOCs had pointed out that the district court's statement in text "in no way suggests that section VIII(C) was to become the exclusive test for decree modifications," because "[t]he footnote to this comment makes clear the context . . ." Reply Brief of the Bell Company Appellants Regarding Information Services, filed Sept. 20, 1989, at 14 n.9 (quoting footnote 266). In choosing to read the text of page 195 in light of the accompanying footnote, the court of appeals not surprisingly decided that the BOCs' argument on this point was the more persuasive one.

It was thus quite clear to the court of appeals that “[n]othing in the [district] court’s [contemporaneous August 1982] opinion suggests that section VIII(C) was designed in addition to displace the parties’ agreement that a public interest standard would apply to *uncontested* motions to modify” the line-of-business restrictions. 900 F.2d at 306-07; App. 50a (emphasis in original).

After concluding that the district court erred in applying the Section VIII(C) standard to an uncontested motion to lift the information services restriction, the court of appeals directed a remand for application of the public interest test. The district court promptly set a briefing schedule under which those favoring information services relief filed by August 22, 1990, responses are due by October 3, 1990, and replies are due by November 21, 1990.

Although the actual parties to the decree do not disagree with the court of appeals’ interpretation of the decree, petitioners — principally, businesses currently operating in the information services market, and their trade groups, who are opposed to competition from the BOCs — have sought review in this Court on the basis of their status as limited intervenors below. Despite the pendency of the remand and its expeditious scheduling, petitioners seek review of the case now, arguing that the court of appeals departed from the proper standards of decree construction and of appellate review, and that extraordinary circumstances exist requiring immediate intervention by this Court.

REASONS FOR DENYING THE WRIT

Introduction

There is no reason whatever for this Court to review the decision below.

The decision at issue is a narrow one, interpreting a single consent decree by employing conventional tools of construction. The analysis is tightly fact-bound, turning heavily on the wording of one section of the decree, the particulars of the parties' May 1982 filings in the district court, and detailed examinations of the text and a footnote on a page of the district court's contemporaneous opinion. There is nothing to distinguish the opinion below from the run-of-the-mill case where participants dispute the meaning of decree provisions, a court applies standard rules of construction, and some participants (here, limited intervenors, not parties) continue to insist that error has been committed. The case therefore raises no issues of general interest.⁷ The attempt to suggest otherwise rests solely on distortions of the opinion below and of decisions by other circuit courts and this Court.

Moreover, even if the two questions put by petitioners were presented by this case, there would be no basis for the assertion that the circumstances merit review by this Court *now*, for the court of appeals has simply remanded the case to the district court for application of what it regards as the proper standard for uncontested modifications of this particular consent decree. No emergency potentially worthy of this Court's immediate attention exists. The information services restriction, which

⁷ Contrast *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 225-26 n.1 (1975) (involving a consent decree term raising issues common to dozens of FTC antitrust decrees).

was not a necessary part of the decree in the first place, will nonetheless remain in place at least until the district court acts. If indeed relief from the restriction is granted, and this affects petitioners in a tangible manner raising a genuine stake in the outcome, this Court will be free to address these and any other issues on a full record. Review at this time would merely interrupt a remand process which is already well under way.

Argument

1. *The first "Question" is not actually presented.*

The first "Question Presented" asks whether the court below erred in supposedly rewriting the decree — "in replacing express language in the AT&T consent decree with its own 'flexible' test for removal" of the restrictions. Pet. i.

Clearly, however, no such question is actually presented. The court below merely applied standard tools of construction to determine that the *parties* had manifestly embraced the traditional public interest test for uncontested consent decree modifications.

The established meaning of the public interest test is clear: it "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." 900 F.2d at 307; App. 51a (emphasis in original). The court of appeals cited ample authority on this point, *see* 900 F.2d at 305-06, 309; App. 47a-49a, 55a, and petitioners nowhere suggest the test is unsettled.⁸

⁸ Petitioners do seize on the court of appeals' well-supported admonition that the district court "bear in mind the *flexibility* of the public interest inquiry" in

In effect, therefore, petitioners ask this Court to review a lower court opinion that was never written. In that phantom opinion, the court of appeals apparently rubs out express language making Section VIII(C) the exclusive standard, and substitutes its own test. This is hardly responsible advocacy: it turns the opinion below upside down in the effort to create a question where none exists. Far from replacing express decree language with its own view of the proper standard, the court below was, in truth, searching for an express statement that might displace the general rule that a public interest test applies to uncontested modifications. But it found that "the only *express* intention relating to section VIII(C) was that it would displace the *Swift* test for reviewing contested modifications." 900 F.2d at 307; App. 51a (emphasis in original).

The question *actually* put forth by petitioners, then, is simply whether the court below erred in the conclusions it drew using the conventional tools of consent decree construction. Yet that question is so specific to this decree that it plainly does not merit review.

Petitioners urge, contrary to the belief of all parties to the decree, and the opinion of the court of appeals, that the "normal meaning" of the decree's language is that Section VIII(C) provides the exclusive standard for decree modification. Pet. 17. Even if petitioners' quite aberrant view of the "plain language" were supportable, this argument manifestly raises no issue of general applicability.

allowing parties to reach settlements within a broad range, 900 F.2d at 309; App. 55a (emphasis in original). With this word they suggest that the court constructed "its own indefinite and 'flexible' test," Pet. 3. They complain that the "principal characteristic" of the test is flexibility; they term it "the court of appeals' flexible test"; and they characterize the test as "newly-fashioned". Pet. 14. But despite these comments, there is no argument that the court of appeals erred in articulating the *content* of the public interest test. The asserted error is the court of appeals' disregard of the supposedly applicable "express standard" of Section VIII(C). Pet. 3.

Petitioners also stress, as they did in the court of appeals, the *text* of page 195 of the district court's August 1982 opinion discussing the "appropriate test," and attempt to minimize the force of the *footnote* that accompanies this text, on which the court of appeals relied and which indicates that the test being discussed is that governing contested modifications. Pet. 20-21 & n.34. The interpretation of the court below appears plainly correct. But even if that were less clear, such a particularized dispute — over whether a sentence fragment seized on by an intervenor should be read in isolation, or whether it should be read in light of the accompanying footnote — is obviously not of the sort worthy of review by this Court. It is difficult to think of an issue of consent decree interpretation that could turn more on the facts of the particular case.

Equally fact-specific is petitioners' suggestion that the court below "ignored six years of history that flatly contradicts" its interpretation. Pet. 18. This is said to be the case because more than 130 petitions "to waive or remove line-of-business restrictions," almost all uncontested, were reviewed by the district court under Section VIII(C), and because "each was resolved under Section VIII(C) *without any objection* to application of the Section VIII(C) standard." Pet. 19 (emphasis in original). Petitioners present a flawed picture, and tracing all their distortions would require extensive analysis of the decree history. In brief, early in that history, the district court endorsed the parties' view of the Section VII public interest standard by approving several waiver requests under it.⁹ In light of this

⁹In *United States v. Western Elec. Co.*, 569 F. Supp. 990, 1019 (D.D.C. 1983), the district court noted that "the Court is technically being asked to modify the decree, pursuant to Section VII, to allow limited inter-LATA service by the Operating Companies," and it approved the modification "provisionally subject to reevaluation" In addressing whether the BOCs would be allowed to provide time-and-weather services notwithstanding the information services restriction, the district court observed that the prohibition could be lifted on a motion brought under either Section VII or Section VIII(C), Mem. op. of Nov.

recognition of the applicability of Section VII, the BOCs continued to cite Section VII in subsequent requests,¹⁰ and this changed only when the district court, on July 26, 1984, decided for reasons of administrative convenience to require submission of all waiver requests to the Department of Justice for market analysis under the Section VIII(C) standard.¹¹

8, 1983, at 2 (Ct.App.J.A. at 329), and subsequently concluded that "[t]he provision of this service is obviously in the public interest," and granted relief under both standards. *United States v. Western Elec. Co.*, 578 F. Supp. 658, 660 (D.D.C. 1983). The district court granted "a waiver pursuant to section VII of the decree to permit [the BOCs] to continue to deliver to AT&T inter-LATA sent-paid coin calls from coin telephones." Mem. op. of Feb. 6, 1984, at 10. The district court also granted New York Telephone's "motion pursuant to section VII of the decree seeking permission to provide inter-LATA non-optioned Extended Area Service (EAS) between two adjacent exchanges in upstate New York," Mem. Order of July 19, 1984, at 1.

¹⁰ E.g., Motion of Ameritech, et al., dated Dec. 8, 1983, at 1 (waiver request to provide "911" services, invoking Section VII); Motion of Pacific Telephone and Nevada Bell, filed Dec. 14, 1983, at 1 (waiver request to provide "911" services, invoking Section VII); Motion of Pacific Telephone, et al., filed Dec. 29, 1983, at 1 (request for waiver to provide foreign exchange services in California, invoking Section VII); Motion of Southwestern Bell, filed Dec. 29, 1983, at 1 (request for waiver to provide local flat-rate service along Texas-Mexico border, invoking Section VII); Motion of BellSouth, filed Dec. 30, 1983, at 1-2 (request for waiver to allow operation of intrastate WATS service, invoking Section VII); Motion of BellSouth, filed Jan. 27, 1984, at 1-2 (requesting waiver covering activities of software subsidiary, invoking Sections VII and VIII(C)); Motion of Southwestern Bell, filed Feb. 13, 1984, at 1 (requesting waiver to permit intrastate, inter-LATA "800" service, invoking Section VII); Motion of NYNEX, filed Feb. 15, 1984, at 1 (requesting waiver to provide office communications systems, invoking Sections VII and VIII(C)); Motion of BellSouth, dated Feb. 24, 1984, at 1 (requesting waiver to allow submission of bid on NASA contract, invoking Sections VII and VIII(C)); Memorandum of Southwestern Bell, filed Mar. 30, 1984, at 11 (requesting temporary waiver concerning intercarrier revenue-division arrangements, invoking Section VII).

¹¹ *United States v. Western Elec. Co.*, 592 F. Supp. 846, 873-74 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). The district court, after receiving "a number of suggestions concerning procedures for dealing with present and future requests for waivers of the line of business restrictions," stated that "[i]n order to encourage informal negotiation and resolution, to avoid inundation of the Court with requests, and to make use of the expertise of the Department of Justice, all such requests will be initially referred to the

Nothing in this order challenged the parties' May 1982 agreement about the applicability of a public interest standard under Section VII for uncontested modifications. Nor did the district court suggest that its past orders of relief under Section VII (the most recent handed down just seven days earlier, see *supra* note 9), had somehow been in error. The fact that the district court itself thereafter chose to invoke Section VIII(C) in resolving uncontested requests to lift line-of-business restrictions, and that the district court's routine grants of uncontested requests left the BOCs with little incentive to appeal, in no way suggests error in the decision of the court of appeals below. Moreover, even if the BOCs had somehow acquiesced for a time in the use of Section VIII(C),¹² petitioners do not explain how this could override the plain language of the decree and the history of its drafting, particularly given the other parties' adherence to the test, see *supra* note 1.

2. *Nor is the second "Question" actually presented.*

The second "Question Presented" asks whether the court of appeals "failed to accord appropriate deference" to the district court's interpretation of what the decree means. Pet. i. There appear to be three separate facets to this question. In petitioners' view, the court erred in taking the "extremely activist approach" of "review *de novo*," leaving "no room for deference to the interpretation of the district court," Pet. 21. On the wholly unsubstantiated theory that other circuits would have deferred to the district court here, petitioners assert that certio-

Department of Justice"; the Department's role would be to perform a screening function by considering "formally or informally" whether the competitive showing articulated by Section VIII(C) had been made. *Id.* at 873 (citations omitted).

¹² In fact, a BOC appealed from the district court's administrative order of July 26, 1984. The appeal was dismissed on the ground that the district court's opinion "was neither a final decision nor an appealable interlocutory order." *United States v. Western Elec. Co.*, 777 F.2d 23, 24 (D.C. Cir. 1985).

rari should be granted "to clarify the standards appellate courts should apply" on review of consent decree cases. Pet. 21. Petitioners also suggest that the opinion below conflicts with a rule of appellate deference supposedly announced by this Court in *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959). Pet. 17, 21.

On inspection, every facet of this argument simply collapses.

First, the *de novo* review by the court of appeals of the matter of law before it *did* "accord appropriate deference" due the district court. The court of appeals took "careful account of the explanatory opinion issued by the district judge at the time the decree was entered," 900 F.2d at 294 n.10; App. 24a n.10, a factor routinely considered in any *de novo* analysis. To be sure, the court of appeals rejected the idea "that this particular district judge's interpretations should be afforded some 'special' deference because he drafted the pivotal provision of the decree, section VIII(C), and because he has had enormous experience overseeing the case and the decree since its inception." 900 F.2d at 294; App. 24a. But there is nothing unusual about declining to give special weight to the views and *post-hoc* explications of a district judge simply because of who he is, *e.g.*, 673 F. Supp. at 533 n.24; App. 120a-121a n.24. That is known as the rule of law.

Second, the statement of the court below that an approach "apparently embraced by other circuits," 900 F.2d 294; App. 24a (citing *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986)), might argue for affording special deference to this district judge does *not* "acknowledge[] conflict with other federal appellate courts," Pet. i, and does not itself raise an issue worthy of review. This Court "'reviews judgments, not statements in opinions,'" *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). As petitioners themselves must concede, even the circuits they cite as in "conflict" routinely

employ *de novo* review on consent decree interpretation issues.¹³ The opinions petitioners cite establish, at most, that where (unlike here) the language and history of a consent decree are silent on an issue, and where (unlike here) the parties themselves do not agree on a construction of the decree, greater weight should be accorded the conclusions of a district judge who has had substantial experience with a case.

For this "question" to have independent significance beyond a simple relitigation of the merits of *this* case, petitioners must establish that some other circuit reviewing an issue of consent decree interpretation, upon finding that the text and contemporaneous history clearly pointed to one interpretation (on which all parties agree), would nevertheless adopt a contrary interpretation simply because the particular district judge who drafted the language had a contrary view. It is difficult to imagine a circuit establishing this rule, and the decisions cited by petitioners provide no support for it.¹⁴ There is simply nothing

¹³ Pet. 22 n.39 (citing *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986)). These other circuits have repeatedly applied the *de novo* standard without affording any particular deference to the views of the district judge administering the decree. See, e.g., *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (making clear that under *Keith v. Volpe* "[a] district court's interpretation of a consent judgment is a matter of law and freely reviewable on appeal"); *Stotts v. Memphis Fire Dep't*, 858 F.2d 289, 299 (6th Cir. 1988); *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985); *AMF Inc. v. Jewett*, 711 F.2d 1096, 1100-02 (1st Cir. 1983).

¹⁴ For example, in *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 893 (9th Cir. 1982) (cited in Pet. 22 n.36), the district court ruled that the plain language of the decree permitted certain conduct, and that the parties had never expressed a purpose to bar the conduct; the court of appeals held that this finding "deserves deference." See also *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (Pet. 22) (relying on *Vertex* in a similar context). *Brown v. Neeb*, 644 F.2d 551, 558 & n.12 (6th Cir. 1981) (Pet. 22 n.37), merely affirmed the finding of the district court that the clear purpose of the parties required a certain interpretation of the decree where the language was silent, holding that the district judge's "views deserve deference" as a key "relevant aid[] to contract interpretation . . ." *Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984) (Pet. 22 n.37), followed *Brown v. Neeb* and observed that the views of a district judge with more than a decade of experience under

to the claim that several circuits “follow a rule contrary to that applied by the court of appeals in this case,” Pet. 22. For the only “rule” in this case — once petitioners’ mischaracterizations of it are set aside — is that the court of appeals will not discard its own assessment of a decree’s plain meaning in blind deference even to an indisputably experienced district judge. There is thus no conflict in the circuits, and no important issue of consent decree review for this Court to resolve.¹⁵

Third, there is nothing to petitioners’ attempt to create a conflict with *Atlantic Refining*, where this Court supposedly “held that a reviewing court should affirm the district court’s interpretation of a consent decree provision” where the language and history support it, and “‘where the trial court concludes that this interpretation is in fact the one the parties intended,’” Pet. 17 (quoting *Atlantic Refining*, 360 U.S. at 24). *Atlantic Refining* established *nothing* about appellate court deference to

a decree were “‘entitled to deference,’” *id.* at 461 (citation omitted), but there is no indication that much turned on this deference; in fact, the court observed that “our primary goal must be to discern the intent of the parties as embodied in the agreement.” *Id.* *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983) (Pet. 22 n.37), cited “the usual considerations of contract interpretation” in *rejecting* the district court’s view that decree provisions were “fatally ambiguous,” although it stated that “[i]n matters fairly open to debate, we have deferred to the conclusions of the district court.”

¹⁵ Petitioners further urge that this case merits review because there is a nagging “conceptual problem” in reading *United States v. Armour & Co.*, 402 U.S. 673 (1971), to embrace *de novo* review of consent decree interpretation because “*Armour* did not involve the appropriate standard of review at all, and in no sense required courts of appeals to forego the obvious wisdom of deferring to the understandings of a district court familiar with the making and administration of a decree” (Pet. 22-23). But *de novo* review of consent decree interpretation has been standard at least since the decision in *Hughes v. United States*, 342 U.S. 353 (1952), where this Court did not believe that “obvious wisdom” required it to defer to a three-judge district court; it overturned the district court on a simple analysis of the language and history of the decree.

Petitioners’ complaint about “[u]ncritical application of a *de novo* standard of review,” and their closing wishes for “this Court to articulate standards of consent decree review” designed to “accommodate” the character of particular decrees; to be “sensitive to the origin and function” of the language involved; and to be “respectful” of district court efforts to administer their decrees with

district courts. The district court there rejected the government's proposal that a novel interpretation of an existing consent decree would better suit the decree's purposes. This Court simply agreed on that record "with the trial court," rejecting the government's "strained" textual argument in the face of its "long-standing acquiescence" in the decree interpretation favoring the antitrust defendant, and stating that the purposes of the applicable statutes did not "warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues." 360 U.S. at 22-23 (footnote omitted).

The *Atlantic Refining* reasoning later crystallized into the "four corners" test of *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). As this Court explained in *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975), these cases each held that "it is inappropriate to search for the 'purpose' of a consent decree and construe it on that basis" where the result is in tension with the normal reading of the language and history of the decree, and where there is no indication that both parties embraced this supposed purpose. The portions of the Court's *Atlantic Refining* opinion immediately preceding and following the surgically excised block quote on which petitioners hinge their position, Pet. 17, illustrate that *Atlantic Refining* in fact articulates a substantive rule for decree construction, not a rule of appellate review.¹⁶

"coherence," Pet. 24, simply offer additional window-dressing for their view that the court below erred — which is the entire focus of the second "Question Presented."

¹⁶ The full block quotation, with the portion omitted by petitioners italicized, reads as follows:

We do not decide the case on any question of laches or estoppel, nor do we comment on any possible modifications of the decree which might appropriately be made under Clause X of the judgment, which continues the jurisdiction of the District Court. We merely hold that where the language of a consent decree in its normal meaning supports an interpretation; where that interpreta-

There is thus *nothing* in the decisions of other courts of appeals, or in *Atlantic Refining*, that would remotely endorse a trial court prerogative to discount the language and history of a decree, substitute its own view of what the parties meant to do in the decree, and demand deference to that judgment on appeal.

3. *Nor do extraordinary circumstances warrant this Court's disruption of the ongoing remand.*

That the asserted error in this single case is the real basis for petitioners' plea for review is illustrated by petitioners' final concern: "Most importantly, the appellate court's ruling threatens to dislocate coherent enforcement of competitive protections that affect the daily lives of most Americans, as well as billions of dollars of annual investment in 'a vast and crucial sector of the economy.' " Pet. 4 (quoting 552 F. Supp. at 152). Petitioners intimate that the information services ban was designed "to redress persistent antitrust abuses" and that, "[t]o ensure that the remedy would endure," the decree required Section VIII(C)'s standards to be met before the ban was lifted. Pet. 3. Petitioners conclude that "review of this case [is] a

tion has been adhered to over many years by all the parties, including those governmental officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place. Accordingly, the judgment below is Affirmed.

360 U.S. at 23-24 (footnote omitted). The omitted language makes clear that the sole focus of *Atlantic Refining* is on limiting the ability of the government, after long validating a reasonable construction of the decree which the trial court believes was embraced by both parties, to urge a contrary interpretation based on what it suddenly claims was its *real* reason for entering into the decree. This is a substantive guide for the interpretation of consent decrees generally; it has nothing to do with standards of appellate review.

matter of pressing importance" because growth in the information services market supposedly "depends on the decree's information services restriction," which petitioners claim "generated a wave of investment," Pet. 15. The Court should not defer resolution of the case, we are told, because the decision below "will alter the conduct of ongoing proceedings"; because immediate review would advance judicial economy and fairness to the parties; and because the BOCs may otherwise win on remand. Pet. 16.

First and foremost, these are not reasons for urging a grant of certiorari. Petitioners are not before a court of appeals asking for immediate, interlocutory review of an issue in advance of the normal appeal of right; they are requesting exceptional, discretionary review of supposedly important general issues of federal law. The courts of appeals render numerous opinions each year altering "the conduct of ongoing proceedings" in cases involving sizable stakes, but this Court routinely denies efforts by affected interests to interrupt remand proceedings with review of fragments of the case. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.*, 389 U.S. 327, 328 (1967). In so doing, this Court makes plain that the value of judicial economy is not to be ignored simply because much is at stake.

Second, this ground for review — that the court of appeals' supposed reinterpretation threatens to remove allegedly essential protections of the information services market and imminently to injure consumers — not only depends on detailed factual inquiry but also begs the whole question now being litigated on remand: whether dropping the information services ban is indeed within the reaches of the public interest. Given that the AT&T antitrust litigation has never involved any charge, much less any finding, of anticompetitive behavior in the information services market, and given that the Department of Justice now urges that lifting of the information services ban carries no

substantial risk of lessened competition and would in fact greatly benefit consumers as well as conserve vital enforcement and judicial resources for other uses,¹⁷ the factual inquiry necessary to address this ground for certiorari would need to be extensive. Yet that is precisely the point of the remand. In any event, the information services ban will not be lifted until all relevant points are thoroughly addressed and such relief is found to be within the public interest. Thus no ground for certiorari is supplied by petitioners' economic assessment.

Third, nothing could be more unsettling to this large sector of the economy than for this Court to grant review prematurely and derail the remand proceedings that are already under way with a briefing cycle scheduled for completion this November. If anything would unsettle market behavior, it would be needless protraction of the lower court proceedings. Thus the objective for all parties ought to be rapid completion of the remand.

¹⁷The Memorandum of the United States in Support of Motions For Removal of the Information Services Restriction, filed August 22, 1990, in the district court remand proceedings, reflects the results of the Department's latest assessment of its enforcement experience, market facts, the efficacy of regulation, and the views of a variety of interested persons. *Id.* at 8-9.

As to risks to competition, confirming its 1987 conclusions (see *supra* note 3), the Department explained that the "critical assumptions" about possible risks to competition that had led the parties in 1982 to include the information services restriction as a precautionary measure had "proved flawed," and that "there is no continuing justification for the information services restriction." *Id.* at 14-15.

The Department found (again confirming its 1987 conclusions) that the interests of consumers outweigh any risk. It concluded that the remaining information services ban "is itself an unnecessary bar to potentially procompetitive services," *id.* at 36; that "the BOCs' expertise in telecommunications and their large customer bases make them natural competitors in information services markets," *id.* at 37; and that BOC entry "could be especially important in promoting innovation and increasing competition," *id.* at 37.

Also outweighing any risks, the Department noted, are "the administrative and enforcement burdens of retaining the information services prohibition" which it said "are great," given the demand for "technical expertise that neither a law enforcement agency nor the judicial system normally possesses," and "[g]iven the Department's and the Court's many other responsibilities and limited resources" *Id.* at 38.

The result can in due course be addressed by this Court if a petition is then filed. If, as it seems reasonable to assume at this stage, the court of appeals' interpretation of the decree is correct, then a grant of interlocutory review now followed by an affirmance later would add a year or more of delay to the remand. The petition is an unnecessary distraction which should be promptly eliminated.

CONCLUSION

For the reasons stated, the writ of certiorari should be denied.

Respectfully submitted,

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JOSEPH F. SPANGL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MCI COMMUNICATIONS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JAMES F. RILL
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly interpreted the AT&T consent decree to provide that uncontested petitions for waivers of the decree's restrictions are governed by the general modification standard embodied in section VII of the decree rather than the special standard embodied in section VIII(C) of the decree.

2. Whether the court of appeals was required to afford "special" deference to the district court's current interpretation of the AT&T consent decree because of the district court's familiarity with the decree.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-9

MCI COMMUNICATIONS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 900 F.2d 283. The opinions of the district court (Pet. App. 62a-108a, 109a-273a) are reported at 714 F. Supp. 1 and 673 F. Supp. 525.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a-61a) was entered on April 3, 1990. The petition for a writ of certiorari was filed on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The consent decree entered in 1982 to terminate the United States' antitrust case against AT&T required AT&T to divest the Bell Operating Companies (BOCs). Pet. App. 274a-276a; see *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The decree also placed line of business restrictions on the BOCs, generally limiting them to providing local telephone service. Section II(D), Pet. App. 277a. In particular, the BOCs were precluded from offering "information services," which include services such as LEXIS by which information stored on a computer may be accessed by telephone. Pet. App. 16a & n.5. The BOCs were also barred from providing interexchange (long distance) service and from manufacturing telephone equipment. *Id.* at 16a.

The district court agreed that the line of business restrictions were in the public interest in 1982. However, it expressed the belief that, over time, the BOCs would likely lose their ability to leverage their monopoly power into competitive markets, so that the need for the restrictions would disappear. 552 F.Supp. at 194. Retaining the restrictions once they had become unnecessary would be anticompetitive, the court noted, because they would prevent the BOCs from entering new markets. *Id.* at 195 n.264. It concluded, therefore, that the decree should provide for the removal of the restrictions if they became unnecessary.

The proposed consent decree contained a general provision, section VII, authorizing modification of the decree. In their presentations to the district court, the parties addressed the standard to govern contested motions for removal of a line of business restriction. They agreed that

the restrictions might be removed “*over the opposition of a party* to the decree when the Court finds that ‘the rationale for [the restriction] is outmoded by technical developments.’” 552 F. Supp. at 195 (emphasis added). The court considered that standard too stringent, however, because it rested on the premise “that the restrictions are justified by the mere existence of monopoly power.” The court also observed that the test “usually applied to a *contested* modification of a consent decree” is the *Swift*¹ standard, which requires a showing of “unforeseen conditions,” and that such an approach was also too stringent. *Id.* at 195 n.266 (emphasis added). The court concluded that removal of a line of business restriction should occur upon a showing that there is no substantial possibility that a BOC could use its monopoly power to impede competition in the market it seeks to enter. It further concluded that “[t]o avoid any question about the appropriate test,” the alternative standard for such contested modifications “should be explicitly incorporated into the decree.” *Id.* at 195.

The district court thus conditioned approval of the decree on the addition of section VIII(C), which provides that the court “shall” remove a line of business restriction “upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.” 552 F. Supp. at 231. In addition, the decree as adopted contained section VII, the general provision authorizing “the modification of any of the provisions hereof.” Section VII, Pet. App. 284a.² The court had not proposed amending or deleting section VII when it added section VIII(C).

¹ *United States v. Swift & Co.*, 286 U.S. 106, 118 (1932).

² Section VII provides:

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment,

2. The Department of Justice undertook to report to the district court on the third anniversary of divestiture whether the line of business restrictions continued to be warranted in light of competitive conditions in the various telecommunications markets. 552 F. Supp. at 195. The first triennial review report was filed on February 2, 1987.³ After reviewing hundreds of comments on its recommendations, the Department moved on April 27, 1987, to remove the line of business restrictions except with respect to interexchange services. The seven Regional Holding Companies (BOCs)⁴ moved for removal of the restrictions in their entirety.

In orders issued on September 10, 1987, and March 7, 1988, the district court, applying section VIII(C), "left largely intact the decree's so-called 'core' restrictions—those regarding interexchange services, manufacturing, and information services." Pet. App. 21a. However, the court removed the restriction on entry into non-telecommunications-related businesses and modified the restriction on information services to allow the BOCs to provide certain transmission services for information generated by others. *Ibid.*

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1a-59a. In portions of its

or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

³ The decree was entered in 1982; divestiture occurred on January 1, 1984.

⁴ The 22 BOCs were integrated into seven Regional Holding Companies. These Regional Companies are also BOCs. Decree section IV(C) (Pet. App. 278a); 552 F. Supp. at 228, 232 & App. A.

decision that are not at issue here, the court of appeals upheld the district court's removal of the restriction on entry into non-telecommunications-related businesses and the district court's refusal to lift the bar on entry into inter-exchange and manufacturing businesses. However, the court of appeals held that the district court had erred with respect to the standard it had applied in refusing to lift the bar on entry into the information services market. Specifically, the court of appeals held that the general modification standard, section VII, applied because none of the parties to the consent decree had objected to the BOCs' entry into the information services market. Pet. App. 47a-51a. Therefore, the district court had erred in analyzing the issue under section VIII(C), which required a BOC to show that "it could not impede competition in the relevant market as it was believed it could *when the decree was approved.*" *Id.* at 51a. The court of appeals did not itself analyze the restriction under the "public interest" standard of section VII, however. It instead remanded the case, directing the district court to "determine whether removal of the information-services restriction * * * would be anti-competitive under *present* market conditions." *Id.* at 55a. That question is currently under consideration by the district court.

ARGUMENT

At issue in this case is the court of appeals' construction of the terms of a particular consent decree. The court's construction, which is not challenged by any of the parties to the decree, is consistent with the decree's language and history, and the case presents no conflict with the decisions of this Court or any other court of appeals. Accordingly, further review of this interlocutory decision is not warranted.

1. A consent decree is to be construed essentially as a contract. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975). Thus, the initial guide to decree construction is the language of the decree itself, as used "in its natural sense" and in relation to its normal meaning. *United States v. Armour & Co.*, 402 U.S. 673, 678 (1971); *ITT Continental Baking*, 420 U.S. at 236; *United States v. Atlantic Refining Co.*, 360 U.S. 19, 22-23 (1959). Aids to construction of the sort properly taken into account in construing a contract, including the circumstances surrounding the formation of the decree and any technical meaning that the words used may have had to the parties, are also appropriately considered. *ITT Continental Baking*, 420 U.S. at 238; *Atlantic Refining*, 360 U.S. at 22.

The court of appeals followed these precepts, interpreting the two modification provisions by looking "first to the text of the decree, and then, if the question remains subject to doubt, to 'contemporaneous statements of [the decree's] objectives.'" Pet. App. 49a. The court found, first, that section VIII(C), by its express terms, does not purport to be the exclusive standard for removing a line of business restriction, and, second, that the language requiring a "*showing by the petitioning BOC*" appears to contemplate an adversarial proceeding. *Ibid.*⁵

⁵ Petitioners not only object to the holding that section VIII(C) applies only to contested proceedings, but claim that a motion for removal of a restriction is "contested" as long as any one of the approximately 160 parties granted intervention status by the district court in the triennial review proceeding opposes it. Pet. 18. Petitioners cite no authority for their claim, however, and the principle is patently unsound since a proposed modification to a consent decree is uncontested when none of the parties to the decree objects to it. (Non-parties may, however, comment on the propriety of a proposed modification before the district court decides under section VII whether the modification is in the public interest.)

Since section VIII(C) was “silent on the question of what standard applies to uncontested motions” and the decree makes provision for modification in section VII, the court properly looked to the circumstances surrounding the addition of section VIII(C) and concluded that those circumstances “leave little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII.” *Id.* at 49a-50a.

As the court of appeals correctly noted, the district court added section VIII(C) to alter the parties’ stated intention that *contested* motions to remove a line-of-business restriction could be granted only on a finding that the rationale for the restriction was outmoded by technical developments. Pet. App. 50a; 552 F. Supp. at 195. The district court was concerned that the restrictions might subsequently prove to be anticompetitive, and so it believed that a more lenient standard should be provided for their removal. Thus, section VIII(C) was added to supplant “[t]he test usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*” Pet. App. 50a; 552 F. Supp. at 195 & n.266. A modification to which all parties to the decree consented, on the other hand, would not have been judged under either section VIII(C) or the stringent *Swift* standard. Rather, as the court of appeals emphasized, an uncontested modification subject to the general standard of section VII “should be approved so long as the modifications satisfy the ‘public interest’ standard embodied in the Tunney Act” (Pet. App. 26a)—the standard applied by the court in deciding whether the original terms of the consent decree should be entered.⁶

⁶ The Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h) (Tunney Act), requires district courts to determine whether proposed government antitrust consent decrees are in the public interest. The

The district court approved the inclusion of section VIII(C) because it was concerned that the decree not make it unduly difficult to remove anticompetitive restrictions. There is, accordingly, no basis for petitioners' assertion that the district court's inclusion of section VIII(C) was intended to constrict the authority of the parties to eliminate restrictions by subjecting uncontested motions to section VIII(C). And it is particularly unwarranted to assume that the district court, in requesting the parties to add section VIII(C), sought a greater role for itself in uncontested modifications than would be appropriate with respect to the initial entry of the consent decree. Accordingly, the court of appeals correctly concluded that section VIII(C) does not govern uncontested modifications.⁷

district court has not determined whether the Tunney Act applies to this case, but the parties agreed that Tunney Act procedures should be followed when the decree was entered. See Pet. App. 14a n.1.

⁷ Even if the court of appeals erred in its interpretation of the decree, the proper interplay between sections VII and VIII(C) is an issue confined to this case. Petitioners suggest (Pet. 18 & n.30), because of similarities between the decree in this case and a decree entered in *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984), that the decision below conflicts with the Second Circuit's holding in that case. But the decree provision in *Cyanamid* and the circumstances surrounding its formation were quite different from those in this case. Paragraph XI of the *Cyanamid* decree contained a restriction on Cyanamid's activities along with a proviso for its removal. 719 F.2d at 561 (ordering Cyanamid to purchase melamine from other producers "provided that at any time after [ten years] Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly"). Here, by contrast, the decree as proposed by the parties contained the line of business restrictions in section II(D) and a general provision for decree modification in section VII. Section VIII(C) was added to provide a different standard for removal of the

2. Petitioners contend (Pet. 17-21) that the court of appeals' decision conflicts with this Court's decision in *Atlantic Refining*. In *Atlantic Refining*, the Court refused to accept an interpretation, which the government urged would more nearly effectuate the purposes of the statute on which the government's suit had been based, because that interpretation would have "substantially chang[ed] the terms of a decree to which the parties consented." 360 U.S. at 23. The Court agreed with the interpretation of the district court, finding that its interpretation had support in the language of the decree, had been accepted by the parties for 16 years of decree enforcement, and had been found to be consistent with the intention of the parties. *Id.* at 22-24.

The court of appeals' holding here is fully consistent with *Atlantic Refining*. The court of appeals did not overturn the district court's interpretation "simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place" (*Atlantic Refining*, 360 U.S. at 23-24); it did so because it found that the district court's interpretation conflicted with the language and history of the decree and the meaning that the parties intended at the time section VIII(C) was written. It is the court of appeals' interpretation—and not that of the district court—that has support in the language and history of the decree, is consistent with the intention of the parties at the time the decree was entered, and is undisputed by any of the parties to the decree.

section II(D) restrictions where "a petitioning BOC" could make the appropriate showing. Thus, the language of section VIII(C) and the circumstances surrounding its entry show that section VIII(C) did not purport to provide the only means for modifying section II(D), whereas in *Cyanamid* it was reasonable to conclude that the standard set out in Paragraph XI applied to the restriction set out in that same provision.

Petitioners incorrectly claim (Pet. 18-19) that the court of appeals erred by failing to “accord[] significance” to the fact that waiver requests have typically been decided under section VIII(C), rather than section VII. Of course, neither *Atlantic Refining* nor any other decision of this Court suggests that post-decree practices can validate a decree interpretation that is contrary to the decree language and the intention of the parties at the time the decree was entered. Moreover, the waiver history does not support petitioners’ argument. As petitioners note (Pet. 9 n.15), waiver requests have routinely been handled under section VIII(C) because the district court in 1984, finding itself inundated with BOC requests for line of business waivers, established procedures for reviewing them. It ordered that each such request be presented first to the Department of Justice, which would then make a recommendation to the court. *United States v. Western Electric Co.*, 592 F. Supp. 846 (D.D.C. 1984), appeal dismissed, 777 F.2d 23 (D.C. Cir. 1985). For this reason, all BOC-initiated requests, even those ultimately not opposed by any of the parties, have been processed under the same procedure.

It was not until the triennial review that the government itself initiated motions for decree modifications, and the question first arose whether an uncontested modification should be evaluated under section VII or section VIII(C). When the motions for removal of the line of business restrictions were originally filed by the Department and the BOCs, however, they were filed under section VIII(C) because the Department believed that the Section VIII(C) standard was satisfied and did not know that AT&T would not oppose the motions.⁸ It was not until the hearing on

⁸ One BOC urged from the outset that a modification that had the joint support of the BOCs and the government should be decided under section VII. Pet. App. 123a-124a.

the motions, months after the pleadings were filed, that AT&T told the court it would not oppose removal of the information services restriction. Pet. 10 n.18. AT&T then urged the court to consider this aspect of the BOCs' petition under section VII rather than section VIII(C). Pet. App. 20a n.7. On appeal, all the BOCs argued that the uncontested motion for removal of the information services restriction was governed by section VII.⁹ Therefore, there is no basis for petitioners' argument that the parties have consistently interpreted the decree to require the application of section VIII(C) to uncontested as well as contested modifications.

3. Contrary to petitioners' claim (Pet. 21-24), the court of appeals' decision does not conflict with the decisions of other circuits on the standard of review governing consent decree interpretation. As petitioners acknowledge (Pet. 22 n.39), the other courts of appeals uniformly agree with the court in this case that the interpretation of a consent decree is reviewable *de novo*. *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986); *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 892 (9th Cir. 1982) (citing cases in other circuits); see cases cited at Pet. 22 n.37. Nonetheless, petitioners ask this Court to reject or limit that universally accepted *de novo* standard. Pet. 22-23. They argue that the courts of appeals should pay "special" deference to interpretations of district courts that have extensive experience in administering a decree.¹⁰

⁹ The United States took no position on the issue. Pet. App. 25a n.11.

¹⁰ Petitioners also suggest (Pet. 23 n.40) that a "clearly erroneous" standard, rather than a *de novo* standard, should apply when a decree provision is "ambiguous" (relying on contract cases outside the consent decree area). While, as the court of appeals here acknowledged (Pet. App. 23a), factual findings are reviewed under a "clearly erroneous" standard, the "interpretation of Section VIII(C)" (Pet. 23

Not one of the cases on which petitioners rely (Pet. 22 & nn.36-37), however, holds that a court of appeals must give "special deference" to a district court's interpretation that the court finds to be contrary to the express language and history of the decree. Indeed, in the cases relied on, the reviewing courts carefully undertook an independent examination of the decree language and its history to fulfill their "primary goal," which is "to discern the intent of the parties as embodied in the agreement." *Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984); see also *Brown v. Neeb*, 644 F.2d 551, 558 (6th Cir. 1981). Courts that ultimately "deferred" to the district court based their holdings on their independent examination of the language of the decree and the parties' intent, which convinced them that the district court had not erred. *Keith v. Volpe*, *supra*; *Vertex Distributing, Inc.*, 689 F.2d at 892-893 (court of appeals refused to "rewrite" decree to suit purposes of one of the parties). But courts finding that a district court's interpretation was wrong have not hesitated to overturn it. *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983) (refused to defer to district court's interpretation); *United States v. Chicago Board of Education*, 717 F.2d 378, 382 (7th Cir. 1983) (district court erred in holding decree provision "unambiguous").¹¹

n.40) is not such a factual finding. The consistent line of court of appeals precedent cited at Pet. 22 nn.36-37 so holds. See also *ITT Continental Baking Co.*, 420 U.S. at 238 & n.11, 243.

¹¹ Moreover, any reason for deferring to a district court's post-entry decree interpretations has substantially less force where, as here, the court of appeals itself has had extensive experience overseeing the decree. See *United States v. Western Electric Co.*, 777 F.2d 23 (D.C. Cir. 1985); *United States v. Western Electric Co.*, 797 F.2d 1082 (D.C. Cir. 1986), cert. denied, 480 U.S. 922 (1987) (out-of-region exchange services); *United States v. Western Electric Co.*, 846 F.2d 1422 (D.C. Cir. 1988) (non-discrimination provision); *United States v. Western*

Moreover, the court of appeals did pay special heed to the district court's contemporaneous interpretations of section VIII(C) (cf. Pet. 24), taking "careful account of the explanatory opinion issued by the district judge at the time the decree was entered." Pet. App. 24a n.10. As petitioners acknowledge (Pet. 24), sound decree construction ultimately rests on "fidelity to *contemporaneous* understandings that were the basis for the accords" (emphasis added).¹² The court of appeals, faithful to this precept, examined with care the circumstances surrounding entry of the decree and the district court's contemporaneous expressions concerning incorporation of section VIII(C) to ascertain the parties' intention in adding this language to the decree. The conclusion that section VIII(C) governs only contested modifications is solidly grounded in that history.

4. Review is also unwarranted at this juncture because the court of appeals' decision is interlocutory. *American Construction Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389

Electric Co., 894 F.2d 430 (D.C. Cir. 1990) (conditional interests); *United States v. Western Electric Co.*, 894 F.2d 1387 (D.C. Cir. 1990) (meaning of "manufacture"); *United States v. Western Electric Co.*, 900 F.2d 283 (D.C. Cir. 1990) (Triennial Review); see also *United States v. Western Electric Co.*, No. 89-5034 (D.C. Cir. June 12, 1990) (Gateways); *United States v. Western Electric Co.*, No. 87-5403 (D.C. Cir. July 13, 1990) (procurement services); *United States v. Western Electric Co.*, appeal pending, No. 89-5106 (D.C. Cir.) (multiLATA paging); *United States v. Western Electric Co.*, appeal pending, No. 89-5421 (D.C. Cir.) (hearing impaired services).

¹² See also *Atlantic Refining*, 360 U.S. at 24 n.4 (it is the *contemporaneous* construction by those charged with the administration of the act [that] are[] entitled to respectful consideration").

U.S. 327, 328 (1967); cf. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964), and *Estelle v. Gamble*, 429 U.S. 97, 114-115 (1976) (Stevens, J., dissenting) (both cases referring to Court's "usual" or "normal" practice denying interlocutory review). The order remanding for consideration under section VII does not compel the district court to reach any particular result; it only requires the district court to approve the modification if it concludes that it satisfies the public interest standard. If the district court retains the restriction prohibiting the BOCs from providing information services, petitioners will not be aggrieved.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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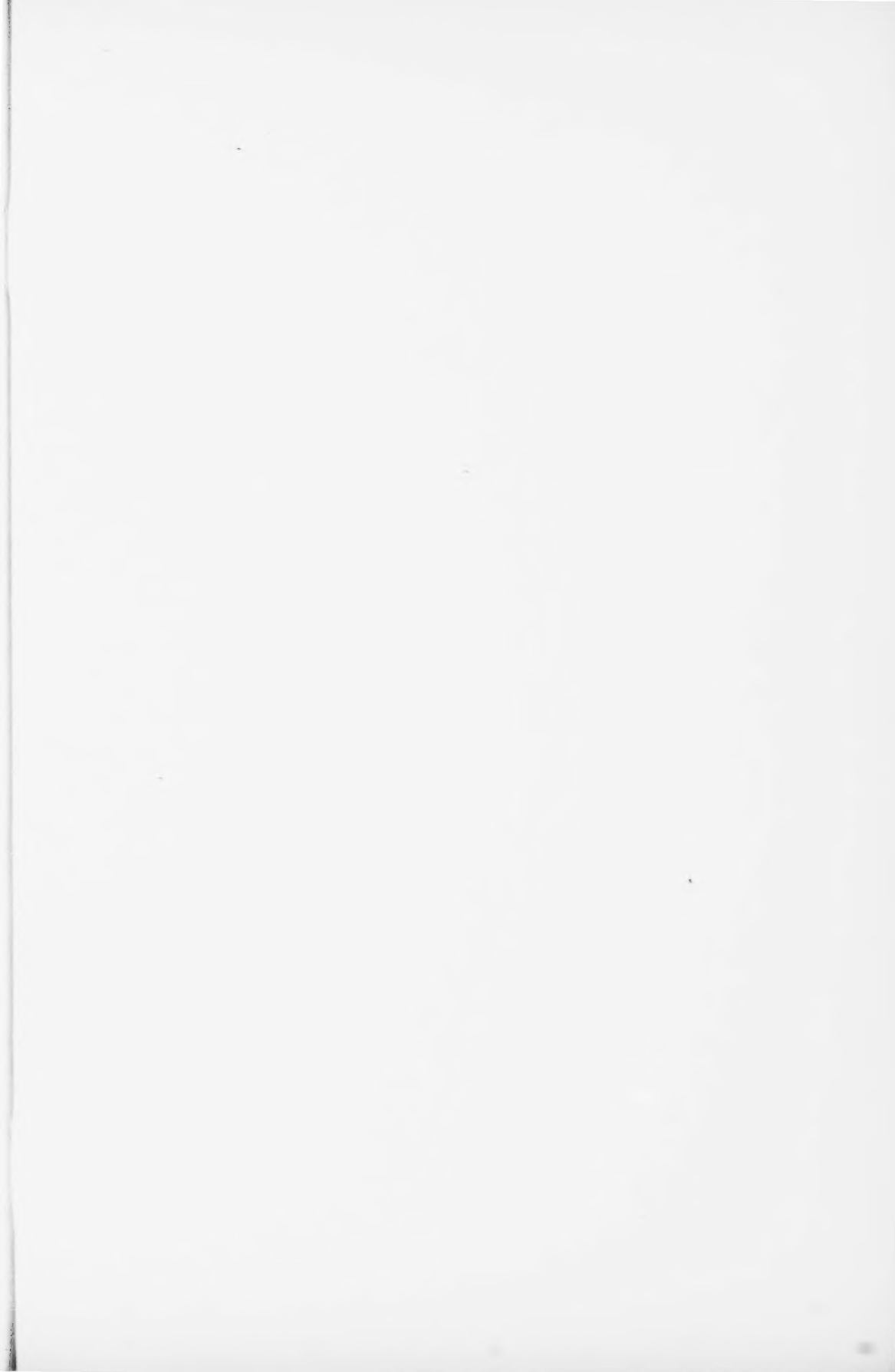
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SEPTEMBER 1990

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1990

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWS-
 PAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERA-
 TION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM
 INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO,
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 TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

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 TION, AMERITECH, NYNEX CORPORATION, SOUTHWEST-
 ERN BELL CORPORATION, BELL SOUTH CORPORATION,
 PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

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 District of Columbia Circuit

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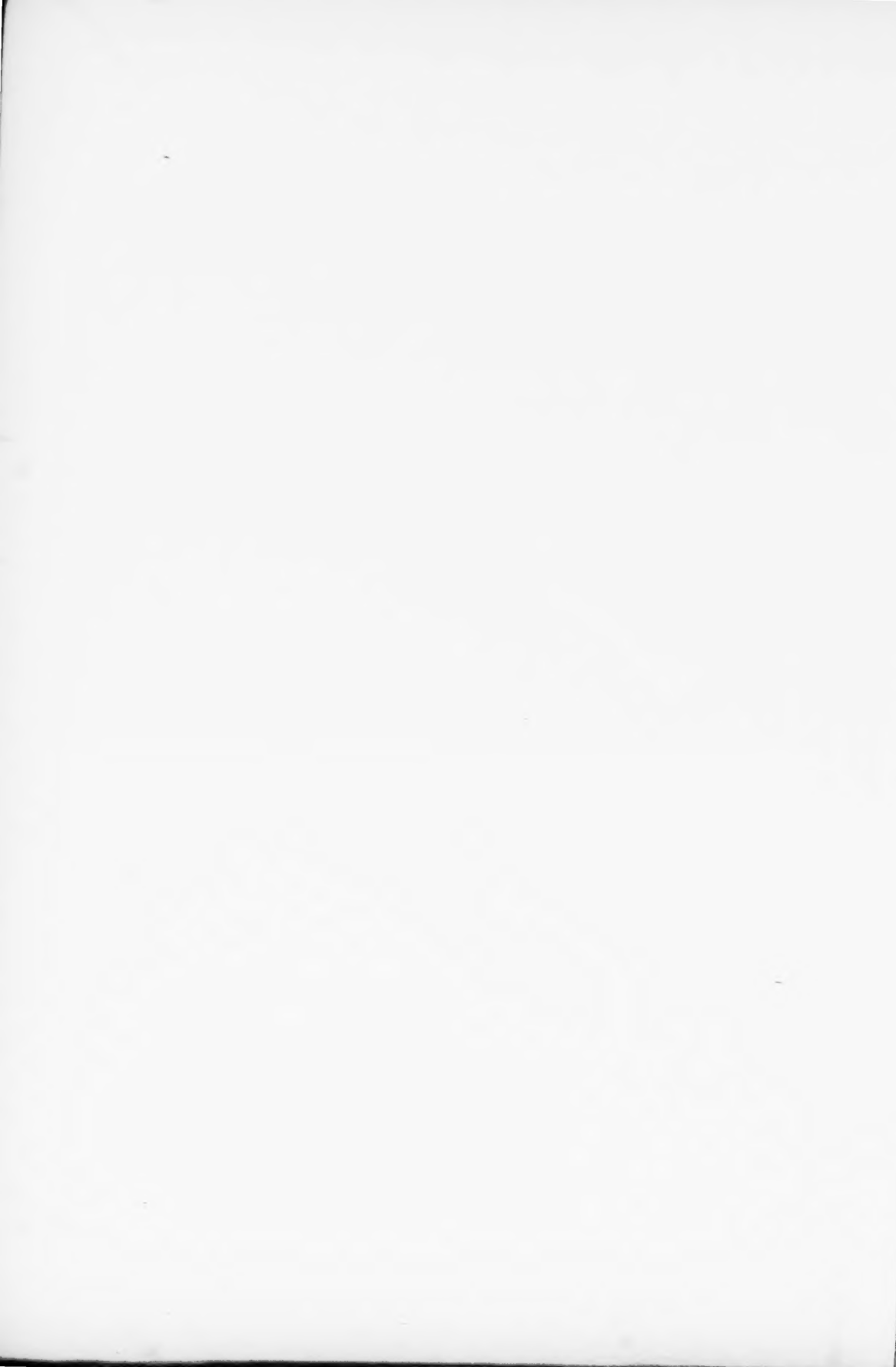
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RULE 29.1 STATEMENT

Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari at iii-v.



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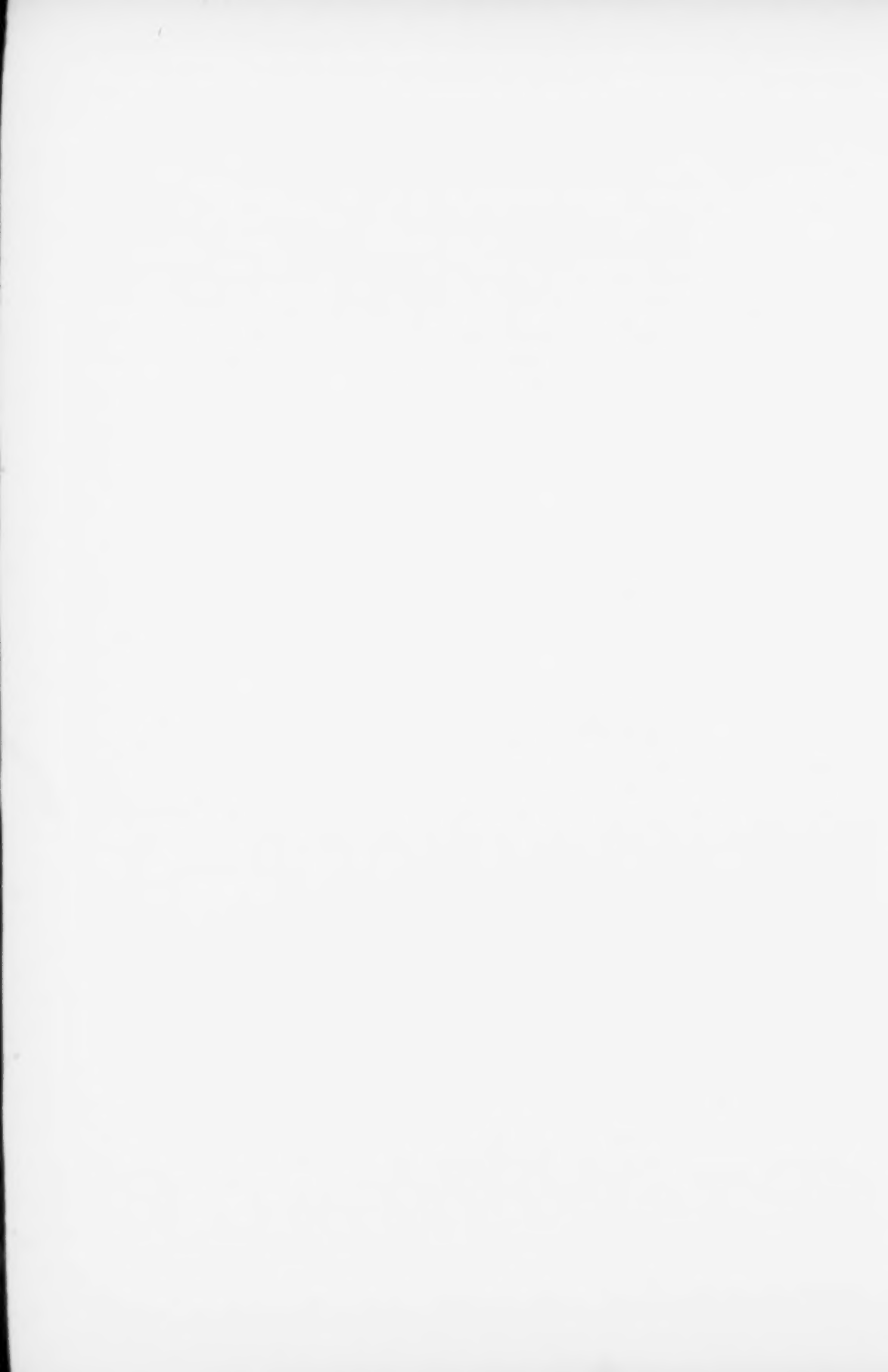
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-9

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERATION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO, THE COMPUTER SOFTWARE AND SERVICES INDUSTRY ASSOCIATION, INC., INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC., TANDY CORPORATION, PHONE PROGRAMS, INC., OHIO CONSUMERS' COUNSEL, NATIONAL TELECOMMUNICATIONS NETWORK, MARYLAND PEOPLE'S COUNSEL, RADIOFONE, INC., AD HOC TELECOMMUNICATIONS USERS COMMITTEE, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA, BELL ATLANTIC CORPORATION, AMERITECH, NYNEX CORPORATION, SOUTHWESTERN BELL CORPORATION, BELL SOUTH CORPORATION, PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit**

REPLY TO BRIEFS IN OPPOSITION

This case involves a consent decree of unique national importance. The Court of Appeals' ruling threatens a substantial change in the meaning of that decree and in the structure of the telecommunications industry. Respondents do not deny the decree's extraordinary significance or the political impact of the ruling. Instead,

respondents urge this Court to decline review on the grounds that the Court of Appeals interpreted the decree correctly, no issues of general significance are involved, and review might be more appropriate at an undefined future time. None of these arguments supports denial of certiorari.

ARGUMENT

1. Respondents' defense of the result below is utterly unpersuasive. Respondents never come to grips with the language of the decree provision at issue. That is not surprising, for the plain language of Section VIII(C) cannot be read to provide different standards for waiver requests depending on whether the request is contested or uncontested:

The restrictions imposed upon the separated BOCs by virtue of Section II(D) [the line of business restrictions] shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

United States v. AT&T, 552 F. Supp. 131, 195 (D.D.C. 1982). This clear statement should resolve any issue as to the intended scope of Section VIII(C), without resort to extrinsic evidence.

To escape Section VIII(C)'s plain meaning, respondents have resorted to scraps of "history" surrounding the formation of the decree to imply an understanding that is nowhere stated in its unambiguous text. This approach violates fundamental principles of construction which dictate the primacy of language in statutes, contracts, and decrees. It also requires acceptance of the anomalous argument that a skilled and experienced district judge, seeking to "avoid any question about the appropriate test for removal" of the line-of-business restrictions, nevertheless failed to express his intent. *See* 552 F. Supp. at 195. If the district judge had intended to require a "flexible" public interest standard for uncontested waiver motions (*see* 900 F.2d at 309; App. 55a), it was well

within his capability to say exactly what he meant. Furthermore, if Section VIII(C) contained any ambiguity—and it does not—compelling evidence of its true meaning is its author's repeated confirmations that Section VIII(C) was intended to govern *all* waiver requests, whether or not they are opposed. See *United States v. Western Electric Co.*, 673 F. Supp. 525, 534 (D.D.C. 1987); *United States v. Western Electric Co.*, 592 F. Supp. 846, 850 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985); 552 F. Supp. at 195 (D.D.C. 1982).

Indeed, the entire history of the decree's administration refutes respondents' implied limitation on the reach of Section VIII(C). The Bell Company respondents are, for example, flatly wrong in suggesting that "all parties to the decree" have consistently understood Section VIII(C) not to apply to uncontested waiver motions. See BOC Opposition at 11. The United States had *never* advocated that view prior to opposing the instant Petition, and explicitly refused to adopt it as recently as oral argument before the Court of Appeals in this case.¹ Nor has AT&T ever advocated the view that Section VIII(C) could be displaced by a "flexible" public interest test for uncontested motions.²

Only the Bell Companies espoused the position ultimately adopted by the Court of Appeals, but even they converted to that position late in the day. During the triennial review proceedings, no Bell Company moved

¹ See Transcript of Oral Argument, at 24-29, cited in Petition for Certiorari at 12 & n.23.

² To the contrary, AT&T argued in the district court that in light of the Bell Companies' inability to meet the Section VIII(C) test, they could obtain removal of the information services restriction only if they could meet the strict *Swift* modification test. AT&T's Reply Comments on the Report and Recommendations of the United States, May 22, 1987 at 17-18; see *United States v. Swift*, 286 U.S. 106, 118 (1932).

under Section VII for removal of the information services restriction; every motion invoked Section VIII(C).³ See Petition for Certiorari at 11 n.17. As the appellate court noted in its summary of the triennial proceedings, “*both the district judge and the parties treated removal of the line of business restrictions as though it were governed entirely by Section VIII(C).*” 900 F.2d at 295; App. 26a (emphasis added).

Nor did the Bell Companies take a different position on Section VIII(C) in earlier proceedings. Their sporadic references to Section VII (in ten out of over 130 waiver requests) shed no light on the instant issue, because it is Section VII that grants the district court jurisdiction to consider all decree-related motions, including those under Section VIII(C). None of the motions mentioning Section VII suggested any distinction between contested and uncontested motions. To the contrary, the Bell Companies invoked Section VII even when the motions were contested.⁴ Virtually all of the Bell waiver motions, including those respondents cite, proffered Section VIII(C) as the governing standard. Indeed respondents cite motions that explicitly acknowledge that Section VIII(C) governs:

³ Respondents attempt to explain their failure to invoke the Section VII standard in initial motions in the triennial and earlier waiver proceedings by claiming uncertainty as to whether the motions would be contested. However, any advocate faced with the uncertainty respondents now posit would have invoked all potentially applicable standards, and would have argued in the alternative. Moreover, many waiver motions uncontested by original decree parties were contested by intervenors, yet the Bell Companies never suggested that a more “flexible” Section VII standard should control until the triennial proceedings.

⁴ *E.g.*, Motion of NYNEX, filed February 15, 1984 (re office communications systems); Motion of BellSouth, dated February 24, 1984 (re NASA contract).

[t]he decree itself contains the standard by which this [line-of-business] prohibition may be waived, at Section VIII(C).

Memorandum in Support of Motion of BellSouth, filed January 27, 1984, at 8 (citation omitted). Another cited motion similarly confirms that "[t]he standard by which a waiver of the restriction shall be granted is set forth in Section VIII(C)." Memorandum in Support of Motion of BellSouth, dated February 24, 1984, at 6.

To paper over their prior practice of consistently invoking Section VIII(C), respondents now suggest—for the first time—that they were compelled to do so by the district court's July 1984 order requiring "submission of all waiver requests to the Justice Department for market analysis under the Section VIII(C) standard." BOC Opposition at 13; United States Opposition at 10. That assertion surely cannot explain respondents' consistent invocation of Section VIII(C) prior to the 1984 order. Nor can respondents' claim be squared with their own submissions in the proceedings leading to the 1984 order, in which they uniformly advocated Section VIII(C) as the proper standard, and never offered Section VII as the alternative standard for uncontested motions.⁵ Had

⁵ See, e.g., Southwestern Bell Corporation's Response to the Memorandum of the United States Concerning Removal of Line of Business Restrictions Pursuant to Section VIII(C), at 3 (filed Mar. 23, 1984) ("The appropriate standard to be espoused with regard to whether or not Southwestern Bell should be permitted to enter into a new line of business is the antitrust-type standard set forth in Section VIII(C) of the decree. . . ."); Response of Ameritech to Proposal of the Department of Justice to Restrict Section VIII(C) Waivers, at 2 (filed Mar. 23, 1984) ("[T]he Court adopted a standard for determining the permissible scope of an operating company's lines of business without unnecessarily restricting their operations. That standard permits an operating company to expand its line of business where 'there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.' Decree § VIII(C)"); Response of BellSouth Corp. to the Memorandum of the United States Concerning Removal of Line of Business Restrictions Pursuant to Section VIII(C), at 6 (filed

the district court's 1984 order wrought a radical change in the standard as respondents now contend, they would have said so. Their silence at the time speaks volumes about what they then thought Section VIII(C) meant.

2. Given the stakes in this case, the need to correct the Court of Appeals' error alone justifies intervention by this Court. This Court would not countenance an appellate court's selective use of scraps of "history" to rewrite a statute in contravention of its plain meaning and consistent prior interpretation. Respondents present no reason why the Court should permit the same type of conduct in contravention of a consent decree of unparalleled scope and importance. This Court often grants certiorari to correct such errors in cases of great importance, even if the error involved was particular to the case in which it arose,⁶ and it should do so here.

In addition, this case indisputably raises issues of general jurisprudential significance respecting the appropriate standards for reviewing district court interpretations of consent decrees. If, as the Court of Appeals held, Section VIII(C) is ambiguous, 900 F.2d at 306; App. 49a, and consent decrees should be interpreted as contracts, 900 F.2d at 293; App. 22a (citing, *inter alia*, *United States v. Armour & Co.*, 402 U.S. at 681-682), then the district court's interpretation of the meaning of Section VIII(C) should have been reviewed under a "clearly erroneous" standard.⁷ At a minimum, the Court

Mar. 23, 1984) ("The threshold standard in the Decree which must be met before entry into new markets is permitted is a showing of 'no substantial possibility' of specified harm, e.g., impeding competition in the relevant market through the use of monopoly power").

⁶ *E.g.*, *Pension Benefit Guarantee Corporation v. LTV Steel Corporation*, 110 S. Ct. 2668 (1990); *cf.* *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 336 (1982). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 222-223 (6th ed. 1985).

⁷ See Petition for Certiorari at 23 n.40 (citing cases).

of Appeals' application of a *de novo* standard of review to an ambiguous decree provision is in substantial tension with the principles federal appellate courts apply when reviewing issues of contract interpretation—a point respondents do not even attempt to rebut.

Nor can respondents hide the conflict the Court of Appeals itself acknowledged with respect to how much deference should be accorded a district court interpretation of a disputed consent decree provision. As respondents would have it, no conflict exists because the Court of Appeals merely held that it would “not discard its own assessment of a decree’s plain meaning in blind deference” to the district court’s contrary interpretation. BOC Opposition at 17. As respondents elsewhere acknowledge, however, the Court of Appeals concluded that the decree’s meaning was not clear on its face. The question presented by this case, therefore, is whether an appellate court should accord deference to a district court’s interpretation of an ambiguous decree provision when the district court drafted the provision and interpreted it consistently over the years. The Court of Appeals’ refusal to accord deference under those circumstances conflicts, in letter and spirit, with standards of review applied in other Circuits. See Petition for Certiorari at 21.⁸

3. Intervention at this time is both appropriate and necessary. Respondents identify no jurisdictional bar to immediate review. They instead suggest that forbearance would advance judicial economy. But respondents are wrong. If, as petitioners contend, the Court of Appeals erred in supplanting the Section VIII(C) standard

⁸ The Bell Company respondents seek to avoid the force of *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959), by misstating the basis for petitioners’ reliance on it. Contrary to the Bell Company respondents’ assertions, petitioners do not argue that *Atlantic Refining* creates a rule of appellate deference. See BOC Opposition at 17-19. Rather, petitioners contend that *Atlantic Refining* sets forth substantive legal principles for determining the meaning of a consent decree. See Petition for Certiorari at 17-21.

with a "flexible" public interest standard, the extensive remand proceedings scheduled by the district court will be for nothing. Furthermore, none of the factual development on remand will bear on the proper interpretation of Section VIII (C).⁹

Nor would denial of review preserve the stability and settled expectations of participants in the market for information services. By undercutting what had been a clear standard for all waiver motions, the Court of Appeals has altered administration of the decree's line-of-business restrictions. The appropriate question for this Court is whether the uncertainties created by that ruling should be resolved now or prolonged for years. As the United States told the Court of Appeals, the use of an incorrect legal standard "not only increases the burden of proceedings and the risk of legal error, but impinges on the ability of firms in the telecommunications industry to undertake rational business planning." Brief for Appellant United States, Nos. 87-5397, 88-5282, at 48 (April 1989). Postponing review serves the interests of no one but the Bell Company respondents, who suddenly have had opened to them the possibility of dominating the developing markets for information services.¹⁰

The pressing national interest in prompt review was well stated by the United States in the court below:

the magnitude of the interests affected by this decree is too great for this Court to allow to stand un-

⁹ The remand will involve factfinding on the separate question whether elimination of the information services restriction would be consistent with the Section VII standard.

¹⁰ Furthermore, respondents are simply wrong to suggest that petitioners and the public will suffer no harm if the information services restriction is retained on remand. The Court of Appeals' ruling has created enormous uncertainty with respect to the proper standard for judging all motions for waiver of line-of-business restrictions, not merely those involving information services. The disruptive impact of that uncertainty will thus persist whether or not the district court retains the information services restriction on remand.

corrected a decision that strays so far from the competitive-based standard mandated by the decree. The parties and the public are entitled to be assured that a decision as important as the first triennial review is based on the proper legal standard.

Brief for Appellant United States at 45.¹¹

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in the Petition for Certiorari, this Court should grant the Petition for Certiorari.

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¹¹ The United States sought review of the substantive Section VIII(C) standard applied by the District Court to all pending motions in the triennial proceedings. See 900 F.2d at 295-300; App. 26a-36a.

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